SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 518

JOHN J. OLING, DAVID J. LANDRY, on behalf of themselves and all other "second officers" in the employ of United Air Lines, Inc. similarly situated, *Petitioners*

v.

AIR LINE PILOTS ASSOCIATION, and UNITED AIR LINES INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on June 4, 1965.

OPINION BELOW

The opinion of the court below, printed in Appendix A hereto (*infra*, p. 1a), is reported in 346 F. 2d 270.

JURISDICTION

The judgment of the court below was entered on June 4, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

The court below ruled that a suit brought by Petitioners in a federal court seeking to remedy violations of the Railway Labor Act was a "collateral attack" upon an order issued by the Civil Aeronautics Board (hereinafter CAB) in connection with a merger proceeding, and could not be entertained by the court even if the subject matter of the suit is not within the exclusive jurisdiction of the CAB. The question presented is:

Where the subject matter of a suit in a federal court alleging violations of the Railway Labor Act involves, in some respects, matters which are also cognizable by the CAB in a merger proceeding, are the federal courts prevented from exercising their normal Railway Labor Act jurisdiction by virtue of the fact that plaintiffs in the court suit had first invoked the jurisdiction of the CAB with respect to the limited matters within its jurisdiction?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are set forth in Appendix B (*infra*, pp. 15a-17a).

STATEMENT

Petitioners comprise a group of about 233 employees of Respondent United Air Lines Inc. (hereinafter "United") who are classified as "second officers", a classification covering those flight deck crew members who perform the work commonly known as flight engineering. They brought this suit on September 4, 1964 in the U. S. District Court for the Northern Division of Illinois as a class action alleging that United and Respondent Air Line Pilots Association (hereinafter "ALPA") had violated the Railway Labor Act (45 U.S.C.A. 151, et seq.), and seeking injunctive relief and damages.

The circumstances out of which this litigation arose have their origin in a long struggle between ALPA and Flight Engineers' International Association (hereinafter "FEIA") for the right to represent flight engineers in the employ of United. Petitioners comprise only a portion of the second officers employed by United. Prior to 1961, Petitioners, together with all other second officers of United, had been represented by FEIA in a bargaining unit confined to flight engineers. Petitioners had been members and officers of FEIA. ALPA had been the collective bargaining representative of the pilots (or "captains") and co-pilots (or "first officers"). For many years ALPA had sought to gain the right also to represent the flight engineers. This effort was openly and vigorously opposed by Petitioners. (P.A. 8, 121-123)[1]

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[1] "P.A." refers to the Appendix filed by Petitioners ("Plaintiffs-Appellants") in the court below. In the factual statements made herein cognizance is taken of the fact that the court below sustained a motion to dismiss the complaint, for lack of jurisdiction and for failure to state a claim and of the well established rule that in such circumstances material factual allegations of the complaint must, for the purposes of this proceeding, be taken as admitted. *Conley* v. *Gibson*, 355 U.S. 41.

In January of 1961, the National Mediation Board permitted a representation election to be held in which —over the opposition of Petitioners and FEIA—flight engineers were requpired to vote in a single unit together with the more numerous pilots and co-pilots, with the result that ALPA was selected and certified as the exclusive bargaining representative for all of United's pilots, co-pilots, and flight engineers in a single bargaining unit of "flight deck crew members" (P.A. 122-123). There is no provision in the agreements thereafter executed between ALPA and United requiring membership in ALPA as a condition of employment, and Petitioners have refused to become members of ALPA. (P.A. 5, 150)

At the heart of the complaint in this case is the claim that from the time when ALPA took over the right to bargain for Petitioners it embarked upon a program, in which United aquiesced, to discriminate against Petitioners because of their known allegience to FEIA, their known opposition to the program and policies of ALPA, and their refusal to become members of ALPA. (P.A. 8) The principal area in which such discrimination manifested itself involved the very basic problem of merging the seniority of the two formerly separate groups of pilots and flight engineers. From the beginning Petitioners had urged upon ALPA and United that since the National Mediation Board had ruled that these two groups now comprise a single bargaining unit of flight deck crew members, all flight deck employees should be credited with all of the time they have flown as a flight deck crew member, with the concomitant right to exercise their seniority so computed to bid for any one of the three flight deck crew jobs for which they are qualified. (P.A. 4-5, 126-127, 158-159) However, from the beginning ALPA made

it clear that it had no intention of following that principle; but intended instead to discriminate against Petitioners by placing them arbitrarily at the bottom of any seniority list from which the jobs of captains and first officers would be bid (P.A. 128-129, 162-163); and this, as the complaint alleges, in order to punish Petitioners for their opposition to ALPA. (P.A. 8)

Meanwhile, and before the problem could be resolved, on April 3, 1961, the CAB entered an order approving the merger of United and Capital Airlines Inc. (hereinafter Capital) under Section 408 of the Federal Aviation Act. (49 U.S.C.A. 1378). On Capital ALPA had been the bargaining representative of both the pilots and the flight engineers. The CAB attached certain conditions to approval of the merger, including the requirement that: ". . . provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected . . ." (P.A. 123, 35-36).

The specific details of the procedures by which ALPA and United resolved the matter of integrating seniority are not germane to the instant petition. Suffice it to state that Petitioner's worst fears of being discriminated against because of their opposition to, and refusal to join ALPA, were realized. Petitioners were denied any real voice in the determination of the policy to be applied; indeed ALPA designated as the principal spokesmen for the United second officers, certain employees who had supported ALPA in its efforts to supplant FEIA and had already voiced their opposition to the claim of Petitioners that all flight deck crew members should be credited with all of their

flight deck time. (P.A. 124-126, 130) And when ALPA finished the process by which they submitted the issues to a strictly intra-union "arbitration" before two boards, in neither of which proceedings United or Petitioners were parties, Petitioners wound up at the bottom of the seniority list from which the jobs of captains and first officers are bid. They were placed substantially behind hundreds of others who had much less flight deck crew service, who had no greater qualifications for those jobs, and who were distinguished from Petitioners only in having been—as Petitioners refused to be—loyal supporters of ALPA. (P.A. 5-6, 128-140, 145-146)

Thereafter, as the complaint alleges, United accepted, without challenge and without any real bargaining, the resolution of seniority that ALPA had dictated, thereby delegating to ALPA complete control over the future job rights and security of Petitioners. (P.A. 6-8). What is more, as the complaint further alleges, in return for having been delegated unfettered control over seniority, ALPA acting as the exclusive bargaining representative of Petitioners, accepted economic terms and conditions far inferior than ALPA would otherwise have agreed to. (P.A. 7)

Believing as they did that the discriminatory conduct by ALPA and United constituted a violation of the Railway Labor Act, Petitioners prepared to bring suit in a federal court. Before doing so, however, Petitioners deemed it necessary to avoid any possible claim that they had failed to exhaust any administrative remedies available to them. They recognized that under the terms of the order in which the CAB had approved the merger of United and Capital the CAB had reserved jurisdiction to amend, modify

or add to the labor protective provisions of said order "as circumstances may require." Accordingly, on November 27, 1963 Petitioners filed a petition with the CAB asking the Board to re-open the record in the merger proceedings for the purpose of taking evidence in support of the claim that seniority had not been integrated in the fair and equitable manner required by the terms of the order approving the merger. The petition asked the CAB, after hearing, to set aside the seniority list, and to determine Petitioners' length of service in a manner which credited Petitioners with their full flight deck crew service. That was the central thrust of said petition; it did not seek anything like complete relief against the discrimination visited upon Petitioners (such as the failure of ALPA to bargain on economic terms without discrimination, or the relinquishment by United of its responsibilities in bargaining concerning seniority); it did not ask for any specific relief or future protection against the discrimination practiced by ALPA, and it did not seek damages—all such matters being beyond the jurisdiction of the CAB in the merger proceeding. (P.A. 99-106, 148-149)

No hearing was held by the CAB on that petition. On April 24, 1964, the Board dismissed the petition. (P.A. 149-150, 106-115) The basis for the refusal of the Board to reopen the record as requested in the petition is best expressed in the final paragraph of the Board's decision:

> "In sum, upon a consideration of the pleadings submitted by petitioners we find no basis for concluding that the seniority lists in question were not integrated in a fair and equitable manner in conformity with the requirements of Section 3 of the Labor Protective Provisions of the United-

> Capital merger order. Where, as here, the carrier and the duly certified representative of the petitioners reached agreement by collective bargaining procedures on a seniority list, and where, as here, the agreement itself conforms to the list resulting from the decision of impartial arbitrators, we find no basis for reopening the record of this case." (P.A. 114-115)

And this refusal of the CAB to set aside the seniority list where the list had been agreed to by the carrier and the authorized collective bargaining representative, was perfectly consistent with the general approach the CAB has taken to such problems—i.e. to leave it to the parties if possible—as is expressed in the following generalization in the CAB decision in this matter:

> "Although the Board has legal power to direct the precise manner in which the individual seniority lists should be merged, we have consistently taken the position that it is more desirable that this task be accomplished by those directly concerned, the employee groups and the carrier, either by agreement or arbitration." (P.A. 111-112)

Having exhausted the limited administrative remedy available, and now addressing themselves to the larger problem of obtaining future protection against the general discriminatory conduct by ALPA and United—going far beyond the matter of seniority as such—Petitioners filed the instant complaint in a federal district court. The complaint (P.A. 3-10) alleges violations of the Railway Labor Act by both ALPA and United generally falling into the following categories: (1) The claim that ALPA violated the Railway Labor Act by failing in its duty of fair representation by discriminating against Petitioners because of their opposition to ALPA and refusal to join that organization;

and the concomitant claim that United violated the Act by entering into agreements with ALPA knowing that those agreements were the products of invidious discrimination against Petitioners; (2) The claim that the discrimination against Petitioners unlawfully encouraged membership in ALPA and interfered with their rights under the Railway Labor Act; and (3) The claim that United violated the Railway Labor Act by delegating to ALPA complete control over seniority, particularly where such delegation was in return for ALPA's agreement to take less in wages and working conditions for Petitioners than they would otherwise have been entitled to (P.A. 6-8). The complaint sought damages and injunctive relief which was by no means limited to setting aside the seniority list; but which would secure protection for the future against the continuance by ALPA, in the conduct of its functions as bargaining representative, of any unlawful discrimination against Petitioners.[2]

Respondent United thereafter filed a Motion To Dismiss (P.A. 15-16) on the ground that the district court

[2] Thus, the prayer for relief asked the court, *inter alia*:

"1. To issue an order enjoining ALPA from discriminatintg against plaintiffs in the performance of its representation functions, and directing ALPA to represent plaintiffs as their collective bargaining agent fairly and without discrimination based upon irrelevant or invidious considerations;

• • •

3. To issue an order enjoining ALPA and United from encouraging membership in, or activities on behalf of, ALPA or any other labor organization, by discriminating against them in any manner whatever in regard to tenure of employment or any term or condition of employment, including seniority status and bidding rights;

4. To issue an order enjoining ALPA and United from interfering with, restraining, or coercing plaintiffs in the exercise of their rights under the Railway Labor Act . . ."

was without jurisdiction and the complaint failed to state a claim upon which relief could be granted. On November 16, 1964 the district court granted the motion without any opinion. (P.A. 210)

On appeal, the court below affirmed the order of the district court dismissing the complaint. In essence, the court below concluded that the action instituted by Petitioners could not be entertained by the district court because it was a "collateral attack" upon the April 24, 1964 order of the CAB.

It is most important to note that the court below reached this conclusion even on the assumption that the matters covered by the instant complaint were *not* within the exclusive jurisdiction of the CAB. The court states that, having concluded that the instant complaint was a "collateral attack" upon the April 24, 1964 order of the CAB:

> ". . . we do not reach the issue as to whether the CAB had exclusive jurisdiction, as argued by defendants, or concurrent jurisdiction, as argued by plaintiffs. In any event, its jurisdiction was invoked and pursued by plaintiffs to the point of an adverse decision, and they failed to seek relief therefrom by a review in the manner provided by Congress." (*Infra,* p. 14a)

The court below emphasizes the fact that Petitioners had not appealed the April 24, 1964 order of the CAB to a Court of Appeals in accordance with Section 1006 of the Federal Aviation Act (29 USCA 1486), *infra,* p. 17a. However, it goes without saying, and was surely recognized by the court below, that if the instant complaint was really a "collateral attack" upon the CAB order it would not have been any less so if brought *after* a direct appeal from the CAB order to a Court

of Appeals. The decision of the court below surely cannot be read as suggesting that an administrative order may be collaterally attacked by a suit in a district court provided that the plaintiff first seeks direct judicial review of the administrative order before instituting the suit.

The decision below must, therefore, be read as interpreting Section 1006 of the Federal Aviation Act as requiring the conclusion that *even where the matter is one over which the CAB and the federal courts have concurrent jurisdiction* a party who elects to first proceed before the CAB is not merely exhausting his administrative remedies; he has made an election which exhausts *all* of his remedies. Having "invoked" the jurisdiction of the CAB, he may not thereafter file suit in a federal court under any statute which would otherwise have given the court independent jurisdiction over the matter. His *only* recourse is to appeal from the CAB order if he has failed to obtain relief from the CAB.

In the context of the instant case, the ruling below means that where plaintiffs in a suit in a federal court alleging violation of the Railway Labor Act have first elected to seek relief from the CAB as to those limited aspects of their claims over which the CAB has jurisdiction, and are denied that relief by the CAB, they may not thereafter file suit in the federal court.

REASONS FOR GRANTING THE WRIT

1. The decision below establishes a new rule, requiring an election between administrative and judicial remedies, even where administrative and judicial jurisdiction is concurrent, which rule is directly contrary

to the principles frequently announced by this Court, and most recently reaffirmed in *United States* v. *Philadelphia National Bank*, 374 U.S. 321.

The complaint in the instant case placed before the district court questions concerning the enforcement of Sections 2, First, Third & Fourth of the Railway Labor Act (*infra*, p. 15a) which, under decisions of this Court, have long been established as being properly within the jurisdiction of the federal courts.[3] The decision below does *not* hold that in this instance the federal courts were ousted of jurisdiction because the subject matter of the complaint was within the *exclusive* jurisdiction of the CAB. Among other things, such a conclusion would have been contrary to several clear pronouncements by the CAB itself to the effect that to the extent it has any jurisdiction with respect to Railway Labor Act matters its jurisdiction is concurrent with, and not exclusive of, that of the federal courts.[4] To the court below it makes no difference

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[3] On the matter of federal court enforcement of the duty under the Railway Labor Act to represent all employees without invidious discrimination see, e.g. *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192. On the matter of the jurisdiction of federal courts to enforce the general prohibitions in the act against interference and coercion see, e.g. *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515; *Texas & N.O.R. Co.* v. *Brotherhood of Railway Clerks*, 281 U.S. 548.

[4] In 1959 the CAB approved a merger of Delta Air Lines and Chicago and Southern Air Lines, attaching as a condition that seniority be merged in a "fair and equitable" manner. After ALPA and the surviving carrier had negotiated a resolution of the seniority merger, a group of pilots filed a "Petition for Revision and Protest" with the CAB challenging the seniority integration. The CAB rejected the petition on its merits; but made the following observation concerning the relationship of its decision to any

whether or not the jurisdiction of the CAB is exclusive; it is sufficient that the CAB has jurisdiction; and the Petitioners, having invoked that jurisdiction, they

contemplated action in the federal courts under the Railway Labor Act:

> "A final comment is in order. The gravamen of petitioners' complaint, as we understand it, is that ALPA, in resorting to alleged arbitrary methods in accomplishing a proposed integration of the seniority lists, and Delta, in failing to assume its share of the responsibility for integration of the seniority lists, engaged in unlawful discrimination. *We take no position on whether petitioners have a cause of action cognizable by the courts.* We note that Delta in its motion to dismiss takes the position that petitioners' 'right of action—if any did ever exist—was in court, and not before the CAB. This has been made clear by the Federal courts, acting in dissimilar but related matters.' [Footnote citing *Steele* v. *Louisville and Nashville Ry. Co.*, 323 U.S. 192 (1944)] We further note that petitioners in their answer do not disagree that they may have a right of action in the courts but that they state, 'However, here we believe that it is patently clear that the Board has primary jurisdiction, and that petitioners are obligated to pursue their administrative remedies, before resort to court action.' *To the extent that petitioners may have been obligated to pursue their administrative remedies before this Board before resorting to any court action they may have in mind, it would appear that any such obligation was fulfilled by the filing of the present petition.*" *(In the matter of Petition for Revision of and Protest Against Integrated Seniority List of Delta-C&S Air Lines, Inc.*, CAB Order No. E-14403, August 31, 1959, p. 6-7, Emphasis added.)

There is a provision of the Federal Aviation Act under which the jurisdiction of the Board with respect to Railway Labor Act matters is broader than it is in Section 408 merger proceedings. Section 401(k)(4) of the Act (49 U.S.C. 1371(k)(4)) states: "It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with [The Railway Labor Act]." This provision was not invoked in the instant case because, among other reasons, there is no basis for obtaining relief against a *union* under this provision and such relief is essential to remedy the discrimination suffered by Petitioners in this case. However, it

are precluded from invoking the jurisdiction of the federal district courts.

Plainly, the jurisdiction of the CAB in the United-Capital merger proceedings brought under Section 408 of the Federal Aviation Act was confined—so far as is here relevant—to determining whether the seniority of the United and Capital employees had been merged in a fair and equitable manner. That is all the petition which the Board dismissed by its order of April 24, 1964 sought to have the CAB consider. No one could possibly contend that in any aspect of its approval of the merger the CAB had undertaken to supervise the enforcement of the Railway Labor Act in all of its broad aspects. A process of negotiations fully in conformity with the Railway Labor Act could have resulted in a seniority merger that was not viewed by the CAB as "fair and equitable", and the converse could equally well be true. And, as we have seen, for the CAB the test of whether the seniority merger was "fair and equitable" is really whether it has been

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must be noted that even in the application of this provision the CAB has recognized that its jurisdiction is no more than concurrent with that of the Railway Labor Act jurisdiction of the federal courts. Referring to the relationship between a CAB proceeding under this provision and pending federal court litigation under the Railway Labor Act, the CAB has said in a recent case:

> "Under 401(k)(4) the Board has an interest separate and distinct from the parties to insure compliance with the Railway Labor Act as necessary for the interest of the public .... The Supreme Court has held that where the courts and a Federal Administrative Agency have *concurrent jurisdiction* to enforce a Federal statute there is no reason why proceedings in the two forums should not proceed simultaneously. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948), reh. denied, 334 U.S. 839 (1948)" (*Flight Engineers' International Association* v. *Eastern Air Lines, Inc.*, CAB Order No. E-19923, August 19, 1963, Emphasis added)

deemed acceptable to the carrier and the employee representative, and not whether the Railway Labor Act has been violated.

Petitioners recognize that under Section 1006 of the Federal Aviation Act (*infra,* p. 17a) they could have appealed from the April 24, 1964 Order of the CAB refusing to reopen the record in the merger proceeding. But it must surely be plain that there was nothing to appeal from. Petitioners do not quarrel at all with the right of the CAB to determine that it will not go behind the agreement made by the authorized representatives of the employees in determining whether the seniority integration was "fair and equitable"; and that would have been the only possible issue in an appeal, and they have never suggested, in any aspect of the instant suit, that their purpose in this suit is to attack that determination by the CAB.

But, as already noted above, the decision below, by relying as it does on the principle of "collateral attack", stands for the basic proposition that Petitioners had *no other remedy* but to appeal from the CAB Order of April 24, 1964. Having elected to proceed before the CAB, says the court below, Petitioners may not now attempt to remedy the Railway Labor Act violations (even those never brought to the attention of the CAB; even those the CAB had no jurisdiction to remedy) by suit in the federal district court.

It is this basic proposition, which is at the foundation of the decision below, that squarely conflicts with decisions of this Court, as well as Courts of Appeals, on the principles to be applied where administrative agencies and the federal court have concurrent jurisdiction.

Where this Court has found—as it frequently has—that certain matters are within the concurrent jurisdiction of administrative agencies and the federal courts, it has sanctioned the institution and prosecution of both proceedings *simultaneously.* Such was the situation in *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, involving a proceeding before the Federal Trade Commission and a suit in the federal court under the Sherman Act. The decision of this Court in that case cannot be squared with any rule limiting the parties to the selection of one or the other tribunal and an appeal therefrom. It will be noted that the CAB has itself specifically accepted the rule of *Cement Institute* as the appropriate approach on the question of the relationship between its jurisdiction and that of the federal courts with respect to Railway Labor Act matters. (*Supra,* fn 4, p. 14)

Where the jurisdiction of administrative agencies and the federal courts is concurrent, there are circumstances in which the doctrine of "primary jurisdiction" requires resort to the administrative agency before instituting court action. If it be assumed that on the matters covered by the instant complaint the CAB had "primary jurisdiction", the decision of the court below conflicts directly with the application of that doctrine by this Court in *United States* v. *Philadelphia National Bank, supra.* In that case, two large banks had proposed to merge. Pursuant to the Bank Merger Act of 1960, the banks obtained permission to consolidate from the Comptroller of the Currency. In granting his approval of the merger the Comptroller disregarded adverse recommendations of the Department of Justice as to the effect of the merger upon competition. The day following the Comptroller's decision, the Department of

Justice sued in a federal court to enjoin the merger, alleging violation of both the Clayton Act and the Sherman Act. The District Court declined to issue the injunction. On appeal, this Court reversed and directed that judgment be entered enjoining the merger. On the issue of "primary jurisdiction" this Court said in terms that are directly applicable to the instant case:

> "We note, finally, that the doctrine of 'primary jurisdiction' is not applicable here. That doctrine requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme. See *Far East Conference* v. *United States,* 342 U.S. 570; *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U.S. 285; Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436, 464 (1954). Court jurisdiction is not thereby ousted, but only postponed. See *General Am. Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U.S. 422, 433; *Federal Maritime Bd.* v. *Isbrandtsen Co.,* 356 U.S. 481, 498-499; 3 Davis, Administrative Law (1958), 1-55. Thus, even if we were to assume the applicability of the doctrine to merger-application proceedings before the banking agencies, the present action would not be barred, for the agency proceeding was completed before the antitrust action was commenced. Cf. *United States* v. *Western Pac. R. Co.,* 352 U.S. 59, 69; *Retail Clerks Int'l Assn.* v. *Schermerhorn,* 373 U.S. 746, 756." (374 U.S. at 353, footnotes omitted)

This Court similarly noted in *General American Tank Car* v. *El Dorado Terminal Co.,* 308 U.S. 422, which it reaffirmed in *Philadelphia Bank,* that:

> "When it appeared in the course of the litigation that an administrative problem, committed to the

> Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but . . . the cause should be held pending the conclusion of an appropriate administrative proceeding." (308 U.S. at 433)

Courts of Appeals have likewise applied this rule. See, for example: *S.S.W. Inc.* v. *Air Transport Association of America,* 191 F. 2d 658 (C.A. D.C.), cert. denied, 343 U.S. 955, which Petitioners submit conflicts with the decision below in a case specifically involving the Federal Aviation Act.

In the instant case the administrative agency was given an opportunity to exercise whatever limited jurisdiction it had on the issues involved before suit was brought in the federal court. It refused to take any evidence on the issue of the seniority merger, preferring to follow the rule that the seniority merger was "fair and equitable" if it satisfied the parties who had achieved it through collective bargaining. To say that the consequence of having gone to the CAB is that Petitioners were left with no means of vindicating the very broad denial of rights under the Railway Labor Act covered by their complaint other than to appeal from the CAB order dismissing their petition is to read into the "primary jurisdiction" principle something the decisions of this Court will not permit.

The decision below, it should also be noted, ignores completely Section 1106 of the Federal Aviation Act (*infra,* p. 17a) a "savings clause" in which Congress has made it clear that the remedies available under the Act are "in addition" to all other "remedies now existing at common law or by statute." To that extent,

the decision below is also in conflict with the decision of this Court in *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, where the Court, in giving effect to a similar clause in the legislation governing the Interstate Commerce Commission, said:

> "Those who contend that no judicial remedy is available place much weight on the fact that, as we have said, the Interstate Commerce Commission has primary jurisdiction in routing practices. . . . To say, however, that such primary jurisdiction compels the conclusion that the courts are without power to award damages in every instance where the Commission may not award reparations by no means follows." 371 U.S. at 88.

The decision below not only is in conflict with the foregoing decisions of this Court, it misapplies and extends the decision of this Court (on which principal reliance is placed by the court below) in *Whitney National Bank* v. *Bank of New Orleans & Trust Co. et al*, 379 U.S. 411. That case involved a suit to enjoin the Comptroller of the Currency from issuing a certificate of authority for a new bank. However, the bank in question had been established as part of a holding company plan, and, as such, required approval of the Federal Reserve Board. That Board had granted approval, and an application for judicial review of that determination by the Board was pending when the lawsuit against the Comptroller was filed. This Court concluded that "the thrust of respondents' complaint goes to the organization of Whitney-Jefferson by the holding company rather than to the authority of Whitney-Jefferson to do business." The Court, upon a review of the applicable statute, concluded that on the matter of the organization of the bank by a holding company the Federal Reserve Board had "*original*

exclusive jurisdiction." That aspect having been approved by the Board, the permission to open the bank for business must be "acted upon routinely" by the Comptroller, and an attack upon the Board's approval of the holding company operation could only be made by an appeal from the decision of the Board.

To apply this decision, as the court below did, is to completely misread what this Court intended the decision to stand for, and to endow the CAB with jurisdiction over Railway Labor Act violations for which there is no statutory support, which the CAB has itself disavowed, and which conflicts with the principles this Court has established.

2. The issue presented in this petition is of far reaching importance in the administration of the Federal Aviation Act and the Railway Labor Act, and, additionally, poses a basic question in the relationship between administrative and judicial jurisdiction which merits the attention of this Court in the exercise of its supervisory powers.

As this Court is aware, ever since the decision in *United States et al* v. *Lowden et al.,* 308 U.S. 225, it has been the regular practice of the Interstate Commerce Commission (in the case of railroad and motor carrier employees) and the CAB (in the case of airline employees) to condition the authority granted by these agencies to carriers to engage in mergers, consolidations, and similar reorganizations upon the provision of conditions for the protection of employees affected. Technological and other organizational changes, occuring now and certain to accelerate in the future, in these basic transportation industries will most certainly increase the occasions in which these problems will come before these agencies. Hundreds

of thousands of employees are directly involved, and they will be directly affected by the rule announced by the court below. That rule would compel them, when faced with the problem of vindicating their rights under the Railway Labor Act which may be involved in the mergers, to forego invoking the limited but important jurisdiction of the ICC or the CAB because to do so is to preclude the possibility of instituting a suit in the federal courts to protect those rights if the ICC or CAB should refuse to provide any relief. And this, even if the federal court suit is, as in the instant case, based upon Railway Labor Act claims far broader than anything the administrative agency could have dealt with if it wanted to. And if the employees first institute action in the federal courts they will be met with the claim of "primary jurisdiction" or failure to exhaust administrative remedies. The importance of a decision by this Court which removes this "Hobson's choice" needs no further emphasis.

The decision below, also throws into complete confusion the entire problem of the relationship between the federal courts and the administrative agencies in areas where there is concurrent jurisdiction. Let us take one illustration that is currently very important. Under Section 8(b)(4) of the Labor-Management Relations Act (29 U.S.C. 158(b)(4)) certain "secondary" conduct by a labor organization is made an unfair labor practice subject to the jurisdiction of the National Labor Relations Board. Under Section 303 of the same Act (29 U.S.C. 187) the identical conduct is made subject to a suit for damages in a federal court. The decision of the court below would stand for the proposition that one who has filed a complaint before the Board, and for any reason failed to obtain the relief requested and within the jurisdiction of the Board to

grant may not thereafter file suit in the federal court, for such suit would be a "collateral attack" on the Board's order.[5] Such a result makes meaningless the whole concept of concurrent jurisdiction. Exercise by this Court of its supervisory powers to remove the cloud which the decision below places upon this important aspect of federal jurisdiction is clearly indicated.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEP 1 1965

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[5] Such a result conflicts directly with the decisions of the Sixth Circuit in *United Brick Workers* v. *Deena Artware, Inc.*, 198 F. 2d 637, (CA 6) and *NLRB* v. *Deena Artware, Inc.*, 198 F. 2d 645 (CA 6), Cert. denied, 345 U.S. 906, where the Court affirmed a district court determination as to whether as a matter of law certain conduct constituted prohibited secondary activity which was contrary to that found by the Board.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1964, APRIL SESSION, 1965

No. 14914

JOHN J. OLING, DAVID J. LANDRY, on behalf of themselves and all other "second officers" in the employ of the United Air Lines, Inc. similarly situated, *Plaintiffs-Appellants,*

v.

AIR LINE PILOTS ASSOCIATION, and UNITED AIR LINES, INC., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 4, 1965

Before DUFFY, CASTLE and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* This action was brought for injunctive relief, alleging conduct by defendants in violation of the Railway Labor Act (45 U.S.C.A. Sec. 151 *et seq.*), and for damages suffered by plaintiffs as a consequence thereof. On September 29, 1964, United Air Lines, Inc. (United) filed a motion, supported by affidavit and brief, to dismiss the complaint "for lack of jurisdiction and for failure of plaintiffs to state a claim upon which relief could be granted." Plaintiffs filed a brief and affidavits in opposition thereto. The District Court, by order dated November 16, 1964, granted defendants' motion to dismiss. From this order plaintiffs appeal.

Defendant United is a common carrier by air, engaged in interstate and foreign commerce, and is subject to the provisions of the Railway Labor Act (the Railway Act) and the Federal Aviation Act (49 U.S.C.A. Sec. 1301 *et seq.*)

(the Aviation Act). Defendant Air Lines Pilots Association (ALPA) has at all times since May 31, 1961 been the certified bargaining representative at United for a single craft or class of employees, consisting of all members of the flight deck crew, including pilots, co-pilots and flight engineers. Prior to May 31, 1961, ALPA represented only the pilots and co-pilots at United, the flight engineers being separately represented by the UNA Chapter, Flight Engineers International Association, AFL-CIO (FEIA). On January 17, 1961, the National Mediation Board (NMB) decided that United's entire flight deck crew constituted a single craft or class for purposes of collective bargaining under the Railway Act.[1] Thereupon, ALPA was elected and later certified as the representative of that craft or class.

Plaintiffs Oling and Landry, on behalf of themselves and others similarly situated, allegedly represent a group of about 233 employees of United who are classed as "second officers," which classification refers to those flight deck crew members who perform the work of a "flight engineer." They comprise only a portion of such officers in the employ of United. Prior to 1961, the second officers had been represented for collective bargaining with United by FEIA in a bargaining unit confined to flight engineers. Plaintiffs had been members and officers of that union. ALPA had been the bargaining representative of the pilots (or "captains") and co-pilots (or "first officers"). A controversy had long existed between plaintiffs and ALPA as to the proper representation of the former, which culminated in the decision of NMB above noted. Thus, while as a result of that decision ALPA became the exclusive bargaining representative of all pilots, co-pilots and flight engineers in the employ of United, including plaintiffs, the latter refused to become members.

---

[1] This decision was upheld by the Court of Appeals for the District of Columbia, UNA Chapter, *FEIA* v. *NMB*, 294 F. 2d 905.

Capital Air Lines, Inc. (Capital) was also an air carrier subject to the provisions of the Railway Act and the Aviation Act. All of Capital's pilots, co-pilots and flight engineers were represented by ALPA for purposes of collective bargaining.

On August 11, 1960, United and Capital entered into an agreement by the terms of which Capital was to be merged into United. The agreement was subject to approval by the Civil Aeronautics Board (CAB or the Board), and upon execution of the agreement proceedings were commenced by United to obtain CAB approval. CAB, after hearing and pursuant to Sec. 408 of the Aviation Act (49 U.S.C.A. Sec. 1378), entered an order dated April 3, 1961, approving the merger. This order was later affirmed by the Court of Appeals for the District of Columbia, *Northwest Air Lines, Inc. et al.* v. *CAB et al.*, 303 F.2d 395.

Included in the terms of the merger order were a number of labor protective provisions ordinarily imposed by CAB upon a surviving carrier to protect employees against possible adverse effects resulting from the merger. Sec. 3 of such provisions (pertaining to seniority integration) provided:

> "Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13."

Section 13 provides that in the event of the failure of the parties to agree, the controversy "may be referred by either party, to an arbitration committee for consideration and determination." CAB reserved jurisdiction "to make

such amendments, modifications and additions to the labor protective conditions imposed by paragraph 2 (c) above as circumstances may require."

On June 1, 1961, the effective date of the merger, the employees of Capital became those of United, with ALPA as the duly certified bargaining unit. Following approval of the merger, ALPA began to implement its own established procedures for formulating an integrated seniority list for all flight deck personnel on the merged carrier. Pursuant to these procedures, representatives were chosen by ALPA from among the employees at each of the affected airlines for the purpose of compiling a single seniority list. Such representatives were unable to resolve their differences concerning seniority integration through negotiation and mediation, and the matters in question were submitted to arbitration in accordance with the procedure set forth in ALPA's Policy Manual.

Two arbitration proceedings were held, the first before an arbitration board headed by Harry Abrahams (the Abrahams arbitration) and the second before an arbitration board headed by David L. Cole (the Cole arbitration). United was not a party to either of these proceedings. The Abrahams award established a seniority integration list for the employees of United, including those employed by Capital previous to the merger, but the matter of integrating United flight engineers into the seniority list was left for determination by the Cole arbitration as ALPA had not been certified as their representative until subsequent to the commencement of the seniority integration procedures.

The award of the Cole arbitration, issued on August 24, 1962, resolved the seniority status of United's flight engineers, respecting their bidding rights to the pilot and co-pilot seats on United aircraft. The award stated:

> "There are really three points of view presented at our hearings—(1) those of the Capital group, (2) the United pilots and second officers, and (3) that of a

> group of older flight engineers who have opposed affiliation with ALPA over the years, [and who have opposed] * * * all moves designed to blend the flight engineer and pilot functions into one category. These are referred to as the career flight engineers, some 244 in number."

The third group, referred to as the "career flight engineers," are those allegedly represented by plaintiffs in this proceeding. They presented their views to the Cole board through their representatives, who made opening and closing arguments and submitted written statements as evidence. In essence, their position was that they were entitled to full seniority credit as pilots for time spent as flight engineers when they had no seniority rights to piloting positions. The Cole board rejected their contentions and stated its reasons therefor, concluding as follows:

> "For these reasons I shall fully protect the rights of the professional flight engineers to the third seat assignments, but I see no equitable basis for placing them on the pilot seniority list ahead of others already on the list or clearly entitled to be on list."

In the period following the arbitration proceedings plaintiffs protested to United that the awards as they related to seniority were unfair and should not be agreed to. However, in June 1963, United and ALPA executed an agreement embodying the awards. The complaint alleged that United accepted without challenge the resolution of the seniority issue.

On November 27, 1963, plaintiffs petitioned CAB to set aside and vacate the integrated seniority list and for other relief, in an effort to obtain their claimed additional seniority rights. They alleged that the Board's jurisdiction to grant such relief was predicated on Sec. 408 of the Aviation Act, upon the Board's own reservation of jurisdiction in the merger order to amend, modify or add to

the labor protective provisions "as circumstances may require," and upon its labor protective provision directing the "integration of seniority lists in a fair and equitable manner * * *."

The petition prayed that CAB open the United-Capital merger case for a hearing respecting petitioners' claim that United and ALPA had failed to integrate seniority "in a fair and equitable manner"; vacate the integrated seniority list agreed to between United and ALPA on June 11, 1963; order United and ALPA to refrain from giving effect to that list, and require that petitioners be given the same credit toward pilot and co-pilot seats as all other members of the flight deck crew.

CAB, on April 24, 1964, gave consideration to the contentions of the parties and to the documentary evidence, including the text of the Abrahams and Cole arbitration awards, and entered an order dismissing plaintiffs' petition. In the order it was stated, "We find no support in the pleadings before us for the relief petitioners request * * *." The Board rejected not only the ultimate request for relief but plaintiffs' factual allegations, upon which relief was sought. Thereupon, plaintiffs, without appealing from such order, commenced the instant proceedings, alleging violations of the Railway Act.

While the parties in their briefs set forth the contested issues in different phraseology, we think they are adequately covered in United's brief as follows:

> "Was the district court correct in dismissing the complaint for lack of jurisdiction and for failure to state a claim upon which relief could be granted either because:
>
> (a) The subject matter of the complaint was before the C.A.B. on a petition filed by plaintiffs and the decision rendered by the C.A.B. with respect thereto could only be reviewed by a United

States Court of Appeals in accordance with the statutory review procedures prescribed by the Federal Aviation Act; or

(b) The C.A.B. had exclusive jurisdiction under the Federal Aviation Act over the subject matter of the complaint thereby immunizing defendants' conduct from the operation of all other laws including the Railway Labor Act."

The jurisdiction of CAB over seniority integration is derived from its merger approval authority under Sec. 408 of the Aviation Act. Although there is no express mention in that section of the Board's authority to prescribe either labor protective conditions or seniority integration procedures, its does provide that CAB shall approve mergers and other related transactions "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * * unless the Board finds that the * * * merger * * * will not be consistent with the public interest."

We do not understand that plaintiffs challenge the Board's jurisdiction or its authority with respect to the seniority integration provision embodied in its order. Therefore, we cite without extended discussion only some of the cases which sustain that jurisdiction and authority. *United States et al.* v. *Lowden et al.*, 308 U.S. 225, 238; *Western Air Lines, Inc.* v. *Civil Aeronautics Board*, 194 F.2d 211, 213-214; *Kent* v. *Civil Aeronautics Board*, 204 F.2d 263, 265; *Outland et al.* v. *Civil Aeronautics Board*, 284 F.2d 224, 228, and *Brotherhood of Locomotive Engineers* v. *Chicago and North Western Railway Co.*, 314 F.2d 424, 429.

Not only have the courts consistently held that the Board has the jurisdiction and authority to impose labor protective provisions, including that for seniority integration, as a condition of merger approval but, in Kent, the reviewing

court sustained the authority of the Board to formulate its own integrated seniority list. In doing so it stated (page 265):

> "Industrial strife may arise by reason of a dispute between the two or more employee groups as to how a unified seniority list should be drawn. And when such a dispute develops, it is within the power of the Board to order the carrier to follow whatever course is necessary and appropriate. An overall supervision of the merging carrier so as to protect adequately the public interest is what Sec. 408 (b) of the Act contemplates, and that is what these orders accomplish. The same power to order the initial integration justifies the Board's further requirement that the employer refrain from making any labor contract in the future which will not conform to it."

Thus, we have a situation where the Board acting within its jurisdiction and authority gave its approval to the merger upon condition that certain labor protective provisions be complied with, including that pertaining to seniority integration as provided by the Cole arbitration and as agreed to by United and ALPA.

Section 1006, 29 U.S.C.A. Sec. 1486, provides in material part:

> "(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter * * * shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed * * * by any person disclosing a substantial interest in such order.
>
> * * *
>
> "(d) Upon transmittal of the petition to the Board or Administrator, the court shall have *exclusive jurisdiction* to affirm, modify, or set aside the order

complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. [Italics supplied.]

* * *

"(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States * * *."

Thus, plaintiffs under this statute were afforded a right to appeal to a United States Court of Appeals for a review of the proceedings by which the seniority list was prepared and accepted by the Board. If they had done so, that Court would have acquired exclusive jurisdiction to consider and determine the merits, if any, of petitioners' assault on the Board's proceedings.

Plaintiffs, now met with the contention that they are not entitled to maintain the present suit because of failure to exhaust their statutory and administrative remedies, state that before bringing the instant suit to remedy the discrimination, and other Railway Act violations, they exhausted their administrative remedies by filing "a petition with the Civil Aeronautics Board seeking relief under the employee protective conditions of the Board's order approving the merger * * *." However, no reason, much less excuse, is assigned for their failure to seek review of the Board's order in accordance with their statutory right.

The cases firmly establish the principle that where Congress has provided a statutory procedure for the review of an administrative order, such procedure is exclusive. A recent case much in point is *Whitney National Bank* v. *Bank of New Orleans & Trust Co. et al.,* 379 U.S. 411. That case involved the Bank Holding Company Act, 12 U.S.C.A. Sec. 1842 (a), particularly Sec. 1848, which provided a statutory procedure for review similar to that in the instant case. Plaintiffs, instead of relying upon such procedure,

sought relief in an independent action which the Supreme Court denied. The Court stated (page 420):

> "* * * where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive. See, *e.g.*, *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507 (1953); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). Congress has set out in the Bank Holding Company Act of 1956 a carefully planned and comprehensive method for challenging Board determinations. That action by Congress was designed to permit an agency, expert in banking matters, to explore and pass on the ramifications of a proposed bank holding company arrangement. To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design."

The instant case is even stronger against plaintiffs on the point under discussion because here the statute lodges "exclusive jurisdiction" in the reviewing court while in Whitney such jurisdiction was found by implication.

Another case much in point is *Holman et al.* v. *Southern Airways, Inc.*, 210 F. Supp 407, wherein the District Court dismissed the complaint and denied the relief requested on the ground that the suit, couched in the terms of a violation of petitioners' contract rights and of their right to fair representation, was in reality an attempt to review a CAB order. Among other things the Court stated (page 410):

> "This Court is convinced that it does not have jurisdiction to grant the plaintiffs the relief they seek, inasmuch as jurisdiction to review orders of the Civil Aeronautics Board is vested exclusively in the Circuit Courts of Appeals."

On the following page the Court stated:

> "It seems to this Court that if the plaintiffs are dissatisfied with the order of the Board, they could, pursuant to the provisions of 49 U.S.C.A. Sec. 1486, of the Civil Aeronautics Act, procure a judicial review of the order * * *. * * * However, in the face of the expressed intention of the Congress to vest exclusive jurisdiction in the various Courts of Appeals to review orders of the Civil Aeronautics Board, this Court feels that any relief, injunctive or otherwise, must be had either from such Courts of Appeals or from the administrative agency in the whose jurisdiction the proceedings originated—in this case, the Civil Aeronautics Board."

We need not cite other cases which sustain the proposition that CAB has been entrusted by Congress with the power to make determinations affecting the protection of employees in merger cases, including the integration of seniority lists. The CAB has made such a determination here. In plain disregard of the express terms of Sec. 1006 of the Federal Aviation Act which prescribes a direct and exclusive method of review, plaintiffs instituted the present action in derogation of the well settled principle that collateral attacks upon administrative orders are not permissible. See *City of Tacoma* v. *Taxpayers of Tacoma et al.*, 357 U.S. 320, 334-337; *Callanan Road Improvement Co.* v. *United States et al.*, 345 U.S. 507, 512-513; *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 381-382.

Plaintiffs make a strenuous but unsuccessful effort to extricate themselves from their present predicament, which rises from the fact that after invoking the jurisdiction of CAB and obtaining an adverse decision, they failed to pursue their statutory remedy for review. Plaintiffs in their brief state:

> "The claims placed before the Court in the instant suit are broader and different from anything the plaintiffs had placed before the CAB while exercising their responsibility to exhaust all administrative remedies before instituting this suit. [As shown, they failed to pursue their statutory right to review.] The CAB did not have jurisdiction to deal with those claims, and could not, under any circumstances, have provided the kind of relief which plaintiffs must have in order to remedy the Railway Labor Act violations here involved, and which is available to them in a suit in a federal district court."

Plaintiffs assert in their reply brief, "No order has been issued by the CAB which would be negated by the relief plaintiffs here seek." A comparison of the record before the CAB as to the relief there sought with that which they now seek by their complaint demonstrates that this statement is clearly erroneous. True, there are some allegations in the complaint not made in plaintiffs' petition before the Board, but in essence they are the same, although in some instances couched in different phraseology.

A detailed comparison of the two instruments would unduly burden this opinion. We shall thus confine the comparison to some of the more salient features. Plaintiffs in their brief state:

> "One of the principal claims raised by plaintiffs in the complaint is the claim that ALPA has violated the Railway Labor Act (45 U.S.C.A. 151, *et seq.*) by failing in its statutory duty of fair representation, by discriminating against plaintiffs, because of their allegiance to FEIA and for other invidious considerations, in the negotiating of their seniority, wages, and working conditions. As a concomitant of this claim, plaintiffs claim that United has also violated the Railway Labor Act by entering into agreements with ALPA knowing

that those agreements contain terms which were the product of invidious discrimination against plaintiffs."

In their petition before the Board they alleged that "United has failed to integrate the seniority of its employees and the former Capital employees in a fair and equitable manner by refusing to accord petitioners credit for service performed, which service has been credited other employees similarly situated"; that "United has invidiously discriminated against petitioners as a class and has caused petitioners to suffer irreparable injury"; that "ALPA has willfully failed to perform its statutory duty as a collective bargaining agent of representing petitioners, a minority of its members, fairly and without prejudice," and that "United and ALPA have acted in bad faith and in a deliberate effort to subvert an order of the Civil Aeronautics Board which requires integration of seniority in a fair and equitable manner, by discriminatorily distinguishing between petitioners and all other members of the bargaining unit."

The close similarity between the charges made before the Board and those in the instant complaint are apparent. And even more important, the thrust of the relief sought before the Board, as in the instant suit, rests on the premise that the seniority integration approved by the Board was not accomplished "in a fair and equitable manner." The Board found that it was so accomplished and rejected plaintiffs' contentions that United attempted to "subvert" the Board's merger order, that United "invidiously discriminated against petitioners as a class," and that ALPA "willfully failed to perform its statutory duty as collective bargaining agent."

Even more important in comparing the two actions is the request for relief. Before the Board, petitioners requested that it "set aside and vacate the integrated seniority list agreed to between United and ALPA on June 11, 1963," and order them "to cease and desist giving effect in any

manner whatsoever to said integrated list." In the complaint, among other things plaintiffs request the Court "to issue an order declaring null and void and unenforcible in any and all respects Pilots' System Seniority List presently in effect on United, and enjoining ALPA and United from giving effect in any manner whatever to that list."

It can hardly be doubted but that the heart of plaintiffs' contention before the Board, as well as in its complaint, is their request for relief from what they claim was their unfair listing relative to seniority rights. Other allegations in their complaint are merely subsidiary to and offered in support of that principal claim.

The conclusion is inescapable that plaintiffs sought a review of the final order entered by CAB on April 24, 1964. Stated otherwise, their action constitutes a collateral attack upon such order. As we have shown, this is not permissible under the law. For this reason the District Court properly dismissed the complaint. Such being our conclusion, we do not reach the issue as to whether the CAB had exclusive jurisdiction, as argued by defendants, or concurrent jurisdiction, as argued by plaintiffs. In any event, its jurisdiction was invoked and pursued by plaintiffs to the point of an adverse decision, and they failed to seek relief therefrom by a review in the manner provided by Congress.

The order appealed from is

AFFIRMED

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

STATUTORY PROVISIONS INVOLVED

Railway Labor Act, 45 U.S.C. 151 et seq.

Section 2, First, 45 U.S.C. 152, First:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Third, 45 U.S.C. 152, Third:

> "Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Section 2, Fourth, 45 U.S.C. 152, Fourth:

> "Fourth. Employees shall have the right to organize and bargain collectively, through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or

agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Federal Aviation Act, 49 U.S.C. 1301 et seq.

Section 408(b), 49 U.S.C. 1378(b):

"(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisi-

tion of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * *."

Section 1006, 29 U.S.C. 1486:

"(a) Any order, affirmative or negative, issued by the Board . . . under this chapter . . . shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

* * * * *

"(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate."

Section 1106, 49 U.S.C. 1506:

"Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

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FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 518

JOHN J. OLING, DAVID J. LANDRY, ON BEHALF OF THEMSELVES AND ALL OTHER "SECOND OFFICERS" IN THE EMPLOY OF UNITED AIR LINES, INC. SIMILARLY SITUATED,
Petitioners,

vs.

AIR LINE PILOTS ASSOCIATION AND UNITED AIR LINES, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT UNITED AIR LINES, INC. IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 518.

JOHN J. OLING, DAVID J. LANDRY, ON BEHALF OF THEMSELVES AND ALL OTHER "SECOND OFFICERS" IN THE EMPLOY OF UNITED AIR LINES, INC. SIMILARLY SITUATED,
Petitioners,

vs.

AIR LINE PILOTS ASSOCIATION AND UNITED AIR LINES, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT UNITED AIR LINES, INC. IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported at 346 F. 2d 270 and is printed in Appendix A to the Petition. The District Court did not render an opinion.

QUESTION PRESENTED.

When the Civil Aeronautics Board ("CAB" or "Board"), acting pursuant to its authority under Section 408 of the Federal Aviation Act (49 U. S. C. § 1378), issues an order approving a merger between two air carriers which order contains provisions for the protection of affected employees, including a requirement that seniority lists of the merged carriers be integrated in a "fair and equitable" manner, and a group of employees later invokes the Board's jurisdiction to challenge the fairness of the list formulated by their collective bargaining representative and the surviving carrier, pursuing their remedy before the CAB to the point of adverse decision, may those same employees maintain an action in the federal district courts under the Railway Labor Act (45 U. S. C. § 151 *et seq.*) raising the same issues and seeking basically the same relief as before the Board or are they relegated to their statutory right of review under Section 1006 (49 U. S. C. § 1486) of the Federal Aviation Act?

STATEMENT.

The facts which led to this litigation arose out of two independent, though closely related, events which occurred almost simultaneously during the spring of 1961. One was the certification by the National Mediation Board ("NMB") on May 31, 1961 of the Air Line Pilots Association ("ALPA") as the exclusive bargaining agent of United's entire flight deck crew following an NMB determination on January 17, 1961[1] that all members of United's

1. This craft or class determination was upheld by the Court of Appeals for the District of Columbia in *FEIA* v. *NMB*, 294 F. 2d 905 (C. A. D. C., 1961), *cert. denied* 368 U. S. 956 (1962), after attack by petitioners here.

flight deck crew, including its pilots, co-pilots and flight engineers, constituted a single craft or class for purposes of collective bargaining under the Railway Labor Act (45 U. S. C. § 151, *et seq.*) (P. A. 19-20).[2] The other was the merger of Capital Airlines into United. The merger agreement was entered into between the two airlines on August 11, 1960, was approved by the CAB on April 3, 1961, and became effective on June 1, 1961, at which time the employees of Capital became the employees of United (P. A. 17-18, 19).[3]

Prior to the certification of ALPA in May 1961 as the representative of United's entire flight deck crew, the flight engineers at United, i.e., those occupying the third seat in the cockpit, had been separately represented for purposes of collective bargaining by the UNA Chapter, Flight Engineers International Association, AFL-CIO ("FEIA") (P. A. 19). Petitioners herein (plaintiffs below) purportedly represent a group of about 233 flight engineers at United commonly known as "career flight engineers", who were affiliated with the FEIA and who, for many years, had opposed affiliation with ALPA together with all efforts to combine the flight deck crew into a single craft or class (P. A. 3, 73). Petitioners refused to become members of ALPA even after the latter's certification in May of 1961 (P. A. 3, 5, 73).

Before the NMB rendered its decision blending United's entire flight deck crew into a single craft or class, petitioners requested that the CAB condition approval of the merger upon appropriate guarantees by United ". . . that the contractual rights of the United flight engineers to pilot

2. References herein to the Appendix filed by petitioners with the court below will be preceded by the abbreviation "P. A.".

3. The CAB order approving the merger was affirmed in *Northwest Airlines, Inc. et al.* v. *CAB, et al.*, 303 F. 2d 395 (C. A. D. C., 1962) (P. A. 17-18).

jobs . . . [be] fully protected." *United-Capital Merger* Case, 33 CAB 307, 391 (1961) (P. A. 123-24). But the Board refused to impose such guarantees, ordering instead that United comply with a set of labor protective provisions of the type ordinarily imposed by the CAB upon a surviving carrier to protect the employees against possible adverse effects of the merger (P. A. 18). In regard to seniority integration, Section 3 of the Board's labor protective provisions stated (P. A. 18, 35-6):

> "Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13."

Moreover, the Board granted petitioners' request to reserve jurisdiction over seniority integration (33 C.A.B. at 391) in order to make any needed changes, providing in its order (P. A. 19, 34):

> ". . . [t]hat jurisdiction is hereby reserved [by the CAB] to make such amendments, modifications, and additions to the labor protective conditions imposed by paragraph 2(c) above as circumstances may require."

Following approval of the merger, ALPA began to implement its own established procedures for formulating an integrated seniority list for all flight deck personnel on the merged carrier (P. A. 20). These are the same procedures which the CAB had previously approved in other merger proceedings. See *Braniff-Mid-Continent Merger Case,* 15 CAB 708, 711 (1952). Pursuant to these procedures, representatives were chosen from among the employees represented by ALPA at each of the affected

airlines for the purpose of compiling a single seniority list. However, the merger representatives so chosen were unable to resolve their differences concerning seniority integration through negotiation, and the matters in question were submitted to arbitration in accordance with the procedures prescribed in ALPA's Policy Manual (P. A. 20).

Two arbitration proceedings were held, the first before an arbitration board headed by Arbitrator Harry Abrahams ("the Abrahams arbitration"), and the second before an arbitration board headed by Arbitrator David L. Cole ("the Cole arbitration"). United was not a party to either of these proceedings (P. A. 20-21).

The Abrahams arbitration award, dated March 28, 1962, established a single seniority list for United's pilots and co-pilots and Capital's pilots, co-pilots and flight engineers, respecting their bidding rights to the first and second seats on United aircraft subsequent to the merger (P. A. 21, 46-64). The matter of integrating United's flight engineers into the seniority list compiled by the Abrahams board was left for determination by the Cole arbitration board, ALPA not having been certified as the representative of United's flight engineers until after the seniority integration procedures had already commenced (P. A. 21).

The Abrahams board credited Capital's pilots, co-pilots and flight engineers with all time spent by them in the third seat of the cockpit as flight engineers for purposes of pilot seniority, in recognition of the fact that at Capital all members of the flight deck crew including its flight engineers had traditionally appeared on a single pilots' seniority list, having been hired as pilots and having been required to qualify as such (P. A. 61, 72, 76).[4] By con-

4. This was largely attributable to the fact that Capital had relatively few aircraft (about 40) requiring three-man crews (P. A. 72).

trast, United maintained two separate seniority lists under different labor agreements—one for pilots and the other for flight engineers (P. A. 51-52). From 1949 to 1954 United's flight engineers unlike those at Capital, were not required to qualify as pilots (P. A. 74-75). However, in 1954 United began to require pilot qualification for all of its flight engineers (P. A. 75). Although United continued to maintain separate seniority lists for its flight engineers and pilots, it also began in 1955 to maintain a "call-up list" containing the names of all flight engineers who desired advancement to pilot and co-pilot positions (P. A. 52, 75). From that time on, a flight engineer was placed on the call-up list upon becoming pilot qualified unless he specifically objected to such inclusion (P. A. 75). All but 29 of United's pre-1954 flight engineers objected to being placed on that list (P. A. 75). Petitioners in this proceeding were among those who objected, the reason being that they preferred the status of "career flight engineers" (P. A. 6, 127-28). This was in marked contrast to the preference expressed by "pilot engineers" on the call-up list who desired advancement to piloting positions.[5] The Abrahams board credited United's pilots and co-pilots with all time spent by them as flight engineers toward piloting positions "*during the periods when it was the policy of United to hire only Pilot-qualified Second Officers . . .*" (P. A. 61) (emphasis added).

The award of the Cole arbitration board, which resolved the seniority status of United's flight engineers respecting their bidding rights to pilot and co-pilot seats on United aircraft, was issued on August 24, 1962 (P. A. 21, 65-83). The award stated (P. A. 73):

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5. The call-up list was specifically recognized in the 1958 FEIA-United agreement which provided that flight engineers on that list who bid into pilot and co-pilot positions would continue to accrue seniority on the flight engineers list for a specified period of time (P. A. 75-76).

> "There are really three points of view presented at our hearings—[1] those of the Capital group, [2] the United pilots and second officers, and [3] *that of a group of older flight engineers who have opposed affiliation with ALPA over the years [and who have opposed] . . . all moves designed to blend the flight engineer and pilot functions into one category.* These are referred to as the *career flight engineers,* some 244 in number." (Emphasis added.)

The career flight engineers (petitioners herein) presented their views to the Cole board through their representatives who made opening and closing arguments and submitted written statements as evidence (P. A. 22, 73).[6] In essence, their position was that they were entitled to full seniority credit *as pilots* for time spent as flight engineers when they had no seniority rights to piloting positions (P. A. 22-3, 73-4). They also argued that "there is a legal duty on ALPA to represent all employees in the expanded bargaining unit, and that if their total length of service is not credited to them in placing them on the pilot seniority list ALPA will be guilty of discrimination against them" (P. A. 74).

The Cole board rejected the contentions of the career flight engineers as being "extreme" pointing out that acceptance of petitioners' views "would reverse a great deal of history and call for a retroactive readjustment of United's pilot seniority list back to 1947" (P. A. 23-4, 78-9). The Cole board noted that the objection to the inclusion of petitioners on United's call-up list came from the career flight engineers themselves (P. A. 78). And the board saw nothing discriminatory in placing the pilot engineers on the call-up list ahead of the career flight engineers for purposes of pilot seniority. The board stated (P. A. 78):

6. Petitioners were represented before the Cole board by the same counsel who represent them here. In addition, a number of petitioners appeared before that board in an individual capacity (P. A. 65).

"The issues presented by these differences, and by the position of the professional flight engineer group, are confused by variables and by facts of history. Capital's practice, as indicated, has been different from United's. The call up list is an unusual type of list. Strictly speaking, it is not part of the pilot seniority list of United, yet it confers bidding rights to copilot vacancies. Oddly, it is not covered by the pilot agreement, but rather by the flight engineer agreement. Still, the two pilot groups, and the company as well apparently, feel that it does partake sufficiently of the nature of a pilot seniority list to entitle individuals on it to be integrated into the combined pilot seniority list. I agree that this is so."

Thus, the integrated seniority list formulated by the two arbitration boards, while preserving petitioners' superior right to third seat assignments, denied to them the same seniority status to first and second seat assignments that had been accorded to the pilot engineers who, unlike petitioners, had made themselves available for ultimate progression to piloting positions. The Cole board expressly noted that even though United was not a party to these arbitrations, it was reasonable to assume that United would give "serious and probably sympathetic consideration to these awards, unless they are patently unreasonable or unrealistic." (P. A. 66-67.)

On August 29, 1962, ALPA advised United by letter of its intention to negotiate the Abrahams and Cole awards into a collective bargaining agreement with United (P. A. 24, 85-6). United thereafter met with representatives of ALPA for this purpose (P. A. 26). Nearly a full year of negotiations passed before United finally concluded an agreement with ALPA on June 11, 1963, embodying the terms of the two awards (P. A. 26, 90-98).

On November 27, 1963, plaintiffs petitioned the CAB to set aside the seniority integration list agreed to by United

and ALPA (P. A. 26-27, 99-106), invoking the Board's jurisdiction under Section 408 of the Federal Aviation Act, Section 4 of the Board's merger approval order, and Section 3 of the labor protective provisions appended to that order.

Petitioners charged that "United has failed to integrate the seniority of its employees and the former Capital employees in a fair and equitable manner. . . ." (P. A. 105, ¶ 20); that "United has invidiously discriminated against petitioners as a class. . . ." (P. A. 105, ¶ 21); that "ALPA has willfully failed to perform its statutory duty as a collective bargaining agent of representing petitioners . . . fairly and without prejudice" (P. A. 105, ¶ 22); and that "United and ALPA have acted in bad faith and in a deliberate effort to subvert an order of the Civil Aeronautics Board which requires integration of seniority in a fair and equitable manner. . . ." (P. A. 105, ¶ 23.) They prayed that the CAB open the *United-Capital Merger Case* for the purpose of holding a hearing respecting their claim that United and ALPA had failed to integrate seniority in a "fair and equitable manner"; vacate the integrated seniority list agreed to between United and ALPA on June 11, 1963; order United and ALPA to refrain from giving effect to that list; require that petitioners be given the same seniority credit for pilot and co-pilot seats as all other members of the flight deck crew; and grant "such other and further relief as the Board deems appropriate in the premises" (P. A. 105-106).

The CAB, after giving ". . . careful consideration to the contentions of the parties and to the documentary evidence . . . including the text of the Abrahams and Cole Arbitration Awards" (P. A. 111), entered an order dated April 24, 1964 dismissing complainants' petition (P. A. 28, 106-15). The order stated (P. A. 111) that "We find no sup-

port in the pleadings before us for the relief petitioners request. . . ."

The CAB found that the seniority list agreed to by United and ALPA was accomplished in a "fair and equitable manner" (P. A. 114). It specifically rejected petitioners' contentions that United attempted to "subvert" the Board's merger order (P. A. 113); that United "invidiously discriminated against petitioners as a class" (P. A. 113); and that ALPA "willfully failed to perform its statutory duty as collective bargaining agent" (P. A. 113-14).

Thereupon, petitioners, without appealing from the CAB's order under Section 1006 of the Federal Aviation Act (49 U. S. C. § 1486), instituted the present action in the District Court below on September 4, 1964. On September 29, 1964, United filed a motion, supported by affidavit and brief, to dismiss the complaint "for lack of jurisdiction and for failure of plaintiffs to state a claim upon which relief could be granted." Plaintiffs filed a brief and affidavits in opposition (P. A. 2).

On November 16, 1964, the District Court entered an order granting defendants' motion to dismiss the complaint. That decision was affirmed by the Court of Appeals for the Seventh Circuit on June 4, 1965 (Pet. Appendix A; 346 F. 2d 270).

ARGUMENT.

The holding of the court below does not, as petitioners contend (Pet. 11)[7], establish a "new rule, requiring election between administrative and judicial remedies." Rather, that holding represents no more than a routine application of the well settled principle that when an administrative agency renders a decision which is within its statutory powers and Congress has prescribed a specific method for obtaining review of such a decision, that method of review is exclusive and the administrative decision may not, therefore, be attacked collaterally in the federal district courts (Pet. 9a-11a; 346 F. 2d at 275-76). See *Whitney National Bank* v. *Bank of New Orleans & Trust Co., et al.*, 379 U. S. 411, 420 (1965); *Holman, et al.* v. *Southern Airways, Inc.*, 210 F. Supp. 407 (N. D. Ga., 1962); *City of Tacoma* v. *Taxpayers of Tacoma, et al.*, 357 U. S. 320, 334-37 (1958); *Callanan Road Improvement Co.* v. *United States*, 345 U. S. 507, 512-13 (1953); *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 258 U. S. 377, 381-82 (1922).[8]

Dismissal of the complaint below was affirmed not merely because petitioners "invoked" the jurisdiction of the CAB, but because petitioners pursued their remedy before the CAB "to the point of an adverse decision" and because they "sought a review" of that decision in the federal district courts instead of following the statutory method of review prescribed by Congress (Pet. 14a; 346 F. 2d at 278).

7. Petitioners' Writ of Certiorari will hereinafter be referred to as "Pet."

8. The pertinent cases supporting this principle (most notably the *Whitney* and *Holman* cases cited above) were considered at length by the court below and need not, therefore, be treated in detail here (Pet. 9a-11a; 346 F. 2d at 276-77).

The court below never reached the question whether the District Court would similarly have lacked jurisdiction over the subject matter had petitioners initially attempted to invoke the jurisdiction of the court rather than that of the CAB (Pet. 14a; 346 F. 2d at 278).

The power of the CAB to resolve controversies over seniority integration arising out of mergers subject to its jurisdiction can hardly be questioned. Section 408 of the Federal Aviation Act (49 U. S. C. §1378) provides that the CAB shall approve mergers "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe . . . [u]nless . . . the Board finds that the . . . merger . . . will not be consistent with the public interest. . . ." And the applicable precedents uniformly hold that Section 408 gives the CAB complete authority with respect to protection of employees affected by the merger, including problems of seniority integration. See *United States, et al.* v. *Lowden, et al.*, 308 U. S. 225, 238 (1939); *Western Airlines, Inc.* v. *CAB*, 194 F. 2d 211, 213-14 (C. A. 9, 1952); *Kent* v. *CAB*, 204 F. 2d 263, 265 (C. A. 2, 1953), *cert. denied* 346 U. S. 826; *Outland, et al.* v. *CAB*, 284 F. 2d 224, 228 (C. A. D. C. 1960); *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Railway Co.*, 314 F. 2d 424, 429 (C. A. 8, 1963), *cert. denied* 375 U. S. 819.

In exercising its power under Section 408, the CAB prefers, of course, to allow the parties themselves (i.e., the unions and the carriers) to formulate their own integrated seniority list through negotiation, agreement and arbitration under general standards or guidelines prescribed by the Board. But in such cases, the Board remains available at all times to hear and determine complaints by interested parties respecting compliance with those standards. See *Delta-C&S Merger Case*, 29 CAB

1347, 1350 (1959). Thus, the United-Capital merger order contained the usual labor protective conditions prescribed by the CAB, including the requirement that seniority integration be worked out between the parties "in a fair and equitable manner" (P. A. 35) with the added proviso that "jurisdiction is hereby reserved to make such amendments, modifications, and additions to the labor protective conditions . . . as circumstances may require" (P. A. 34).[9]

It was shortly after ALPA's certification in May, 1961 as representative of United's entire flight deck crew that petitioners wrote to the CAB notifying it of their disagreement with ALPA over seniority integration and reminding the Board that it had "retained final jurisdiction of the seniority settlement" arising out of the merger (P. A. 161-62) (emphasis added). Petitioners urged that "the CAB fully investigate the seniority problem and allow the . . . FEIA to intervene in behalf of those formerly represented by it under the Flight Engineer Craft" (P. A. 161-62). Then, on January 29, 1962, petitioners wrote to Mr. Sayen, the president of ALPA, advising him that "the C.A.B. has retained jurisdiction to see to it . . . [that] seniority lists be integrated in a 'fair and equitable manner,'" adding that this could not be done unless the career flight engineers were given full seniority credit toward pilot seats for all time spent by them in the third seat of the cockpit (P. A. 175-76).

Finally, after once again apprising the Board of the "need to continue [its] . . . reservation of jurisdiction until

9. During the course of the merger proceedings themselves, petitioners specifically requested that the Board retain jurisdiction "until the seniority and employee integration issues have been settled." That request was made after an unsuccessful effort by petitioners to have the Board condition the merger upon appropriate guarantees by United ". . . that the contractual rights of the United flight engineers to pilot jobs . . . [be] fully protected." *United-Capital Merger Case*, 33 CAB 307, 391 (1961).

this matter has been resolved" (P. A. 118-19), petitioners invoked the Board's reserved jurisdiction in a petition filed on November 27, 1963 (P. A. 99, *et seq.*). The petition reiterated the same charges and recited the same facts that had previously been presented by them to arbitrator Cole in support of their position that anything less than full credit for the third seat service toward piloting positions would be discriminatory and in violation of ALPA's "legal duty . . . to represent all employees in the expanded bargaining unit. . . ." (See Cole award at P. A. 74). These were the same facts, moreover—cast in virtually the same language—that later appeared in the complaint filed by petitioners in the court below, the only difference being that in the complaint the allegations were labeled as violations of the Railway Labor Act.

The CAB accepted petitioners' factual allegations as true for purposes of its ruling (P. A. 113-14). And in its order of April 24, 1964 (P. A. 106, *et seq.*), the Board rejected petitioners' claim that United and ALPA failed to integrate seniority "in a fair and equitable manner" (P. A. 114). It stressed the facts that the Cole board "gave consideration" to that very argument and that petitioners themselves elected "to refrain from being a full party" to that proceeding, pointing out that they did, nevertheless, avail themselves of their right to present their views to the Board (P. A. 114). The Board went on to hold that "the factual allegations by the petitioners [were] . . . completely lacking in any support for the conclusion that United engaged in an effort to 'subvert' the merger order" (P. A. 113). Similarly, it found no basis for the charges that "United . . . invidiously discriminated against petitioners as a class . . ." (P. A. 105, 113) or that "ALPA . . . failed to perform its *statutory duty* as a collective bargaining agent of representing peti-

tioners . . . fairly and without prejudice" (P. A. 105, 114) (emphasis added). Rejecting these contentions *on their merits,* the Board observed that United, as an air carrier, was under a statutory duty "to treat with [ALPA], the designated employee representative" (P. A. 113).

In their affidavits petitioners state (P. A. 202) that the CAB erroneously "pass[ed] *final judgment* on our claims of unfair treatment . . ." without according to them a full and fair hearing, adding that the Board's rejection of their claim of discriminatory treatment had "no basis in fact" (P. A. 201) (emphasis added). They attribute "the errors made by the Board" to its "indiscriminate reliance upon Mr. Cole . . ." (P. A. 201). But despite petitioners' belief that such "errors" had been committed by the CAB, they chose not to seek review of the Board's order under Section 1006 of the Federal Aviation Act, this despite the fact that Section 1006 gives the United States Courts of Appeal on *direct review* "exclusive jurisdiction to affirm, modify or set aside" orders of the CAB. Curiously enough, petitioners' only explanation for this failure is that "there was nothing to appeal from"! (Pet. 15.)

Instead, petitioners allowed the time for *direct appeal* to expire and then filed the present action in a District Court seeking relief under the Railway Labor Act. Petitioners concede that the issues here are "in some respects" identical to those before the CAB (Pet. 2), but go on to argue that the complaint filed in the District Court was addressed "to the larger problem of obtaining future protection against the general discriminatory conduct by ALPA and United—going far beyond the matter of seniority as such. . . ." (Pet. 8). An analysis of the complaint, however, fails to bear out even this partial answer to the decision of the court below. Petitioners say (Pet. 8-9) that there are three categories of issues

covered by the instant complaint, namely, (1) ALPA's violation of its duty to represent plaintiffs fairly and without discrimination under the Railway Labor Act and United's knowing participation in agreements which were the products of such discrimination; (2) unlawful encouragement by respondents of membership in ALPA and interference with plaintiffs' rights under the Railway Labor Act; and (3) the unlawful delegation by United to ALPA of complete control over seniority integration.

But even accepting petitioners' own analysis of the issues presented by the complaint, it is apparent that they are the same issues that were presented to, and rejected by, the CAB. All three categories of issues and all of the facts alleged in the complaint are related to the single notion that the integrated seniority list arrived at by respondents is discriminatory in that it fails to accord to petitioners the seniority credit to which they deem themselves entitled. Their single-mindedness on this score is shown by their insistence that any plan of seniority integration other than the one they themselves proposed must *ipso facto* be discriminatory, and therefore, "unfair" or "inequitable" (P. A. 4-5, 84, 138, 176-77, 198, 201, 203). Moreover, despite the reasonable explanations offered by both the CAB and the Cole board for sustaining the integrated seniority list arrived at by the parties, petitioners insist that the seniority arrangements approved by the Board *could only be* the product of unlawful discrimination —a view which, as we have seen, was rejected by both the CAB and the Cole board.

Nor is there any merit to petitioners' suggestion (Pet. 14-15, 18) that the CAB's inquiry into compliance with its "fair and equitable" standard came to an end when ALPA and United agreed upon an integrated seniority list. Although it is true, as the Board here stated (P. A. 111-12), under ordinary circumstances it prefers that the parties

themselves formulate their own seniority list through negotiation, agreement and arbitration, this in no way alters the fact that the Board retains full and complete authority to set aside such agreements and to prescribe its own seniority list when warranted by the circumstances. Thus, in *Kent* v. *CAB*, 204 F. 2d 263 (C. A. 2, 1953), *cert. denied* 346 U. S. 826, the Court sustained the Board's action in imposing its own list upon the parties, stating at pages 265-66 as follows:

> "And when such a dispute develops, it is within the power of the Board to order the carrier to follow whatever course is necessary and appropriate. An overall supervision of the merging carrier so as to protect adequately the public interest is what Sec. 408(b) of the Act contemplates, and that is what these orders accomplish. The same power to order the initial integration justifies the Board's further requirement that the employer refrain from making any labor contract in the future which will not conform to it."

The fact that here the CAB denied petitioners' request to "set aside and vacate the integrated seniority list agreed to between United and ALPA June 11, 1963" (P. A. 105), only serves to underscore the Board's power in this regard and to confirm the fact that the present action is truly one for "review" of a CAB order.[10] This was

10. This is precisely what distinguishes our case from *Delta-C&S*, 29 CAB 1347 (1959), upon which petitioners rely (Pet. 12). Petitioners incorrectly state that the Board there similarly rejected complainants' challenges to the interpreted seniority list on their "merits" (Pet. 12). The fact is, that the Board in that case never reached the merits of those claims because complainants failed to allege (a) that ALPA did not perform "its statutory function of representing the pilots . . ." and (b) that "Delta or ALPA acted in bad faith or with deliberate intent to subvert the Board's order" (29 CAB at 1350). Both of these allegations were made and passed upon by the Board here (P. A. 105, 113). In any event, even under the circumstances present in *Delta-C&S* the complainants pursued their statutory remedy of review under Sec-

the same relief, incidentally, which petitioners requested of the District Court below (P. A. 10). Indeed, of the eight requests for relief appearing in the complaint (P. A. 9-10), six were expressly concerned with the integrated seniority list agreed upon by ALPA and United. And the two remaining requests (i.e. Nos. 1 and 4), though not expressly directed to that agreement, were necessarily related to it by implication since they were based upon precisely the same facts as the others. It should not be surprising, therefore, that the court below concluded:

> "* * * True, there are some allegations in the complaint not made in plaintiffs' petition before the Board, but in essence they are the same, although in some instances couched in different phraseology. (Pet. 12a; 346 F. 2d at 277.)
>
> * * * * *
>
> "It can hardly be doubted but that the heart of plaintiffs' contention before the Board, as well as in its complaint, is their request for relief from what they claim was their unfair listing relative to seniority rights. Other allegations in their complaint are merely subsidiary to and offered in support of that principal claim." (Pet. 14a; 346 F. 2d at 278.)

Petitioners' reliance upon the CAB's alleged lack of power over unions (Pet. 7, 9) is equally unavailing. In this connection it may be noted that in the *North Atlantic Route Transfer Case*, 14 CAB 910 (1951), *aff'd. Kent* v. *CAB*, 204 F. 2d 263, 265-66 (C. A. 2, 1953), *cert. denied* 346 U. S. 826, the CAB found it unnecessary to decide whether the Trial Examiner properly exercised jurisdiction to order the labor groups to cooperate with Pan American in carrying out a Board approved seniority integration plan, stating as follows (14 CAB at 925):

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tion 1006 of the FAA instead of seeking "review" in the federal district courts as petitioners did here. See *Outland* v. *CAB*, 284 F. 2d 224 (C. A. D. C. 1960).

> "It is objected that the Board does not have such power. We do not deem it necessary to pass upon this point. Our authority to bring the problem before us to an equitable solution is complete through our power to direct Pan American to take appropriate action. . . ."

In that case, the Board specifically included in its order a provision forbidding the carrier from entering into any agreement with the union which would have the effect of discriminating against the interests of a minority in the bargaining unit (14 CAB at 925). In affirming that order, the Court of Appeals stated (204 F. 2d 266):

> "The same power to order the initial integration justifies the Board's further requirement that the employer refrain from making any labor contract in the future which will not conform to it."[11]

Nor does the doctrine of exhaustion of administrative remedies excuse petitioners' failure to seek review under Section 1006 of the Federal Aviation Act. It is well settled that that doctrine requires resort not merely to the administrative agency alone, but resort as well to the judicial appeals provided by the statute from which the agency's

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11. Petitioners themselves recognized the CAB's collateral power over unions since in their petition before the CAB they specifically requested that the Board "order . . . ALPA to cease and desist giving effect in any manner whatsoever to said integrated list . . ." (P. A. 105).

As for petitioners' claim (Pet. 7) that the Board also lacked the power to award *damages* for violation of its "fair and equitable" standard, it is significant that in *Chorbajian* v. *CAB*, 229 F. 2d 81, 83 (C. A. 2, 1956), the Court recognized that the Board had the power either to award or withhold damages for such violations. In any event, the governing rule is that a suit for damages may only be entertained by the courts *after* the Board has already found that a violation of the statute has been committed. Compare *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84, 88 (1962) (Pet. 19), with *S. S. W., Inc.* v. *Air Transport Assn. of America*, 191 F. 2d 658, 662-64 (C. A. D. C. 1951), *cert. denied* 343 U. S. 955 (1952). In other words, the judicial remedy must be consistent with the substantive determination of the administrative agency, not opposed to it, as petitioners urge here.

jurisdiction is derived.[12] Only recently this Court stated in *Whitney National Bank* v. *Bank of New Orleans & Trust Co., et al.*, 379 U. S. 411, 422 (1965):

> "Moreover, it [Congress] has enacted a specific statutory scheme for obtaining review, and *where Congress has directed such a procedure as that found in the Bank Holding Company Act of 1956, the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness.*" (Emphasis added.)

A fortiori, this is so where, as in our case, there is an "express statutory command of exclusiveness."

The *Philadelphia Bank Case* (374 U. S. 321 (1963)), cited by petitioners (Pet. 12, 16-17), is clearly inapposite. There, the Court held that a district court may enjoin a bank merger under the antitrust laws despite earlier approval of the merger by the Comptroller of Currency under the Bank Merger Act of 1960 (12 U. S. C. § 1828 (c)). In so holding, the Court grounded its decision upon the facts: (a) that the acts charged as violations of the antitrust laws were not "precise ingredients" of the Comptroller's "regulatory and remedial powers" under the Bank Merger Act (374 U. S. at 351); (b) that there was ". . . no specific provision for judicial review of . . . [the Comptroller's] decision" (374 U. S. at 351, 354); (c) that the legislative history of the Bank Merger Act shows that it ". . . would not affect in any way the applicability of the antitrust laws

12. See *Pennsylvania R. R. Co.* v. *United States*, 363 U. S. 202, 205-06 (1960); *Far East Conference* v. *United States*, 342 U. S. 570, 577 (1952); *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 767 (1947); *D. L. Piazza Co.* v. *West Coast Line, Inc.*, 210 F. 2d 947, 949 (C. A. 2, 1954), *cert. denied* 348 U. S. 839; *American Bond & Mortgage Co.* v. *United States*, 52 F. 2d 318, 320 (C. A. 7, 1931), *cert. denied* 285 U. S. 538 (1932); *Cleveland, C. C. & St. L. Ry. Co.* v. *Jackson*, 22 F. 2d 509, 511 (C. A. 6, 1927).

to bank acquisitions" (374 U. S. at 352); and (d) that ". . . bank regulation is in most respects less complete than public utility regulation, to which interstate rail and *air carriers* . . . are subject" (374 U. S. at 352) (emphasis added).

None of the above factors is present here. The facts alleged by petitioners in their complaint were not merely "precise ingredients" of the CAB's merger approval authority under Section 408 of the Act; they were "facts" which the CAB actually took into account in rejecting the challenges asserted by petitioners. Final orders of the CAB *are* subject to judicial review under Section 1006 of the Act and the legislative history of that Act reveals no intention to leave the Railway Labor Act unaffected by orders of the CAB under Section 408. On the contrary, Section 414 of the Act (49 U. S. C. § 1384) forecloses operation of the Railway Labor Act to the extent that it may conflict with orders of the CAB under Section 408.[13]

13. Section 414 of the Federal Aviation Act (49 U. S. C. § 1384) provides:

> "Any person affected by any order made under [§§ 408, 409 or 412] shall be, and is hereby, relieved from the operations of the 'antitrust laws,' . . . *and of all other restraints or prohibitions made by, or imposed under, authority of law,* insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." (Emphasis added.)

Significantly, in *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry. Co.*, 314 F. 424 (C. A. 8, 1963), cert. denied 375 U. S. 819, the Court, construing language almost identical to Section 414 of the Federal Aviation Act (49 U. S. C. § 5(11)), held that the ICC acting pursuant to its merger approval authority under Section 5(2) of the Interstate Commerce Act had the power to prescribe whatever seniority integration procedures it deemed appropriate even though the procedures it adopted were in conflict with those prescribed by the Railway Labor Act (314 F. 2d at 431-32). In fact, the Court bolstered its decision by relying upon the plenary authority of the CAB over seniority integration as announced in *Kent* v. *CAB*, 204 F. 2d 263 (C. A. 2, 1953) (314 F. 2d at 429-30). The fact that the Interstate Commerce Act (49 U. S. C. § 22(1)) contained a savings clause similar in scope to

Indeed, it is clear from *Pan American World Airways, Inc.* v. *United States,* 371 U. S. 296 (1963), that where the acts charged as violations of the antitrust law *are* "precise ingredients" of the statutory powers exercised by the CAB under the Federal Aviation Act, the federal district courts are without jurisdiction to entertain the action in the first place since exclusive jurisdiction over such matters had been entrusted by Congress to the CAB. That conclusion applies with even greater force here because the CAB's authority under Section 408 of the Act is immunized from other laws (including the Railway Labor Act) by virtue of Section 414, whereas in *Pan American,* the Board's action was taken pursuant to Section 411 of the Act (49 U. S. C. § 1381) which is not within the ambit of Section 414.

Be that as it may, the court below found it unnecessary to decide whether the District Court would have had jurisdiction under the Railway Labor Act if petitioners had gone there initially. The fact is that petitioners did not, but proceeded instead before the CAB, pursuing that remedy to the point of adverse decision. Under these circumstances, there can be no question but that petitioners' exclusive right of review was before the Court of Appeals under Section 1006 of the Act and having failed to pursue that remedy, their action in the District Court was properly disallowed.

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the one appearing in Section 1106 of the Federal Aviation Act (49 U. S. C. § 1506) (upon which petitioners rely) (Pet. 18) did not require a different result.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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October, 1965.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 518

JOHN J. OLING, DAVID J. LANDRY, on behalf of themselves and all other "second officers" in the employ of the United Air Lines, Inc. similarly situated,
Petitioners,

against

AIR LINE PILOTS ASSOCIATION, and
UNITED AIR LINES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1965

No. 518

JOHN J. OLING, DAVID J. LANDRY, on behalf of themselves and all other "second officers" in the employ of the United Air Lines, Inc. similarly situated,

Petitioners,

against

AIR LINE PILOTS ASSOCIATION, and UNITED AIR LINES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION IN OPPOSITION

Opinion Below

The opinion of the United States Court of Appeals for the Seventh Circuit, dated June 4, 1965, is reported at 346 F. 2d 270.

Jurisdiction

The judgment sought to be reviewed herein was entered on June 4, 1965. The petition for a writ of certiorari was filed on September 1, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Statutory Provisions Involved

The relevant provisions of the Federal Aviation Act of 1958, 49 U. S. C. §§ 1371(k)(4), 1378, 1384, 1486 and 1506, are set forth at Appendix A.

Question Presented

Following Civil Aeronautics Board approval of a merger between two air carriers, does a United States District Court have jurisdiction of an action brought by a group of employees challenging the fairness of provisions for the integration of seniority of employees of the carrier, where a prior proceeding brought by the same group of employees in the Civil Aeronautics Board which sought essentially the same relief under the labor protective provisions in the Board's merger order resulted in a determination on the merits against these employees and where these employees did not seek judicial review of the Board's order in the exclusive manner provided by statute for review of such determinations?

Statement of the Case

Respondent Air Line Pilots Association (hereinafter "ALPA") is the certified collective bargaining representative of all flight deck crew members employed by respondent United Air Lines, Inc. (hereinafter "United"), including petitioners, who are a group of Second Officers employed by United. Respondent United is a common carrier by air, subject to the provisions of the Railway Labor Act, 45 U. S. C. § 151 *et seq.*, and the Federal Aviation Act of 1958, 49 U. S. C. § 1301 *et seq.*, (hereinafter the "Federal Aviation Act" or "Act").

This action arises from an order of the Civil Aeronautics Board (hereinafter the "CAB" or "Board"), dated April

3, 1961, which approved the merger of Capital Air Lines, Inc. (hereinafter "Capital") into United, subject, *inter alia*, to certain labor protective provisions set forth in an appendix to the order (Order No. E-16605; P.A. 18, 32-45).* These labor protective provisions directed "the integration of [Capital and United] seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining" (P.A. 35) and provided for arbitration if the carriers and employee representatives could not agree upon a merged seniority list (P.A. 35-36, 45). The CAB also expressly reserved jurisdiction to amend, modify, or add to the labor protective provisions "as circumstances may require." (P.A. 34).

Prior to the merger, ALPA had been the collective bargaining representative for United's Captains and First Officers (copilots), but not for the Second Officers (flight engineers). However, in January, 1961, the National Mediation Board found that all United flight deck crew members (Captains, First Officers and Second Officers) constituted a single craft or class for collective bargaining purposes and, on May 31, 1961, after an election, ALPA was certified as the bargaining representative for United flight deck personnel (P.A. 19-20, 50-52). All United Second Officers were invited to accept ALPA membership, and two United Second Officers were thereafter elected as special merger representatives (P.A. 20, 53, 54, 170; D.A. 17a)**. Capital flight deck crew members, all of whom were hired as pilots and served interchangeably at the three flight deck positions, had previously been represented by ALPA as a single craft or class (P.A. 19, 72).

Following the merger, the United and Capital pilot representatives were unable to agree upon an integrated senior-

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* References designated "P.A." are to the Appendix of Petitioners in the Court of Appeals.

** References designated "D.A." are to the Appendix of Respondent Air Line Pilots Association in the Court of Appeals.

ity list and the matter was duly referred to a Board of Arbitration, headed by neutral Harry Abrahams. (See ALPA Policy Manual, P.A. 20; D.A. 1a-8a).* The Abrahams Board, however, did not pass upon the seniority of United's Second Officers (P.A. 46-64), since ALPA had not been certified as their bargaining representative until after seniority merger proceedings had begun (P.A. 55-56, 21; D.A. 17a-18a).

After the failure of negotiations and mediation regarding the seniority integration of United's Second Officers, this problem also was submitted to an arbitration panel, headed by neutral David L. Cole. Petitioners, described by Arbitrator Cole as "career" or "professional" flight engineers, were permitted to participate in the hearings, even though "they would not agree to be bound by the award." (P.A. 73; D.A. 19a-20a). Their position was that they were entitled to pilot seniority credit for their entire length of service with United, "regardless of whether they were hired as pilots or flight engineers, and regardless of whether they have been serving as flight engineers or pilots." (P.A. 74).

The Cole award rejected this concept of seniority integration as an "extreme" proposal which would, *inter alia*, "reverse a great deal of history and call for a retroactive readjustment of United's pilot seniority list back to 1947." (P.A. 78). The award also stated that this position "would involve a disregard of one of ALPA's basic seniority policies" and was not "either explicitly or by inference" required by the 1961 National Mediation Board decision (P.A. 78-79). Arbitrator Cole concluded:

> "For these reasons I shall fully protect the rights of the professional flight engineers to the third seat

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* ALPA's neutral arbitration process for resolving seniority disputes in merger situations has previously received the Board's approval. See *Braniff-Mid-Continent Merger* Case, 15 CAB 708, 711 (1952) (P.A. 20).

assignments, but I see no equitable basis for placing them on the pilot seniority list ahead of others already on the list or clearly entitled to be on the list." (P.A. 79; see also paragraph (4), P.A. 82).

Thereafter, ALPA and United entered into collective bargaining negotiations based on the Cole decision (P.A. 85-86) and on June 11, 1963, concluded an agreement which incorporated the integrated seniority list (D.A. 20a-21a; P.A. 26).

Petitioners emerged from these seniority integration proceedings without the loss of any seniority rights which they possessed prior to the merger, and acquired both additional valuable seniority rights and substantial improvements in rates of pay, hours and working conditions (D.A. 15a, 32a-33a). Unlike petitioners, substantial numbers of other United employees suffered loss of seniority rights which they possessed prior to the merger, as a necessary result of compromises and accommodations made to resolve the mutually inconsistent seniority claims of the affected employee groups.

In November, 1963, the petitioners herein filed with the CAB a petition to vacate the integrated seniority list and for other relief, in an effort to obtain added seniority rights (P.A. 99-106). Petitioners alleged that United had "invidiously discriminated against petitioners as a class," causing "irreparable injury," and that "ALPA has willfully failed to perform its statutory duty as a collective bargaining agent of representing petitioners, a minority of its members, fairly and without prejudice." (P.A. 105). They also alleged that United and ALPA had deliberately attempted to subvert the CAB's labor protective provisions by discriminating between them and "all other members of the bargaining unit." (P.A. 105). The petition asserted that the CAB had jurisdiction to grant the relief sought under Section 408 of the Act, 49 U. S. C. § 1378, and the Board's merger order (P.A. 99, 34-35). ALPA and United

filed detailed statements in opposition to the petition (D.A. 9a-36a).

On April 24, 1964, the CAB dismissed the petition, finding "no basis for concluding that the seniority lists in question were not integrated in a fair and equitable manner," as directed by its labor protective provisions (P.A. 114, 106-115). The Board found "most significant" the invitation by Arbitrator Cole to petitioners "to participate as a full party in the arbitration proceeding," stating: "The election by the petitioners to refrain from being a full party and the fact that the outcome of the arbitration was disappointing to them does not derogate from the fairness of the procedures." (P.A. 114).

Though they were dissatisfied with the disposition of their claim by the CAB, petitioners chose not to petition the Court of Appeals for statutory review under Section 1006 of the Act, 49 U. S. C. § 1486, which provides the exclusive means for review of a CAB order. On September 4, 1964, after the statutory period for review in the Court of Appeals had expired, they commenced this action in the District Court, seeking to subject the order of the CAB to judicial review in the District Court.

On the motion of defendant United, supported by defendant ALPA, the District Court, on November 16, 1964, issued an order dismissing the complaint. This order was affirmed by the United States Court of Appeals for the Seventh Circuit on June 4, 1965, on the grounds that the complaint constituted an improper collateral attack upon the order of the CAB. (Pet. App. A; 346 F.2d 270).*

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* References designated "Pet. App." are to the Appendix of the instant Petition for a Writ of Certiorari.

Argument

The decision of the Court of Appeals correctly applies established principles of law. There is no conflict of decisions. This case does not involve issues which merit the attention of this Court. There is thus no reason for further review.

Petitioners commenced this action nearly five months after the CAB had dismissed their petition, which alleged discriminatory treatment by ALPA and United in establishing their seniority rights following the United-Capital merger. Petitioners have never sought judicial review of the CAB order in a United States Court of Appeals, as provided in Section 1006 of the Federal Aviation Act, 49 U. S. C. § 1486. Instead, they began this action in the District Court, seeking a reexamination of the matters previously before the CAB and a determination which would effectively overturn the CAB order.

The decision below recognized that the CAB, under Section 408 of the Federal Aviation Act, 49 U. S. C. § 1378, may establish labor protective provisions and seniority integration procedures, as a condition of its approval of a merger between two carriers. The Board, as it did in this situation, may also expressly retain jurisdiction to implement and enforce such terms and conditions. The CAB also possesses, although it generally does not exercise, the power to actually integrate seniority lists. (Pet. App. 7a-8a; 346 F.2d at 274-275). *United-Western, Acquisition of Air-Carrier Property,* 11 CAB 701 (1950), *aff'd. sub nom. Western Air Lines* v. *CAB,* 194 F.2d 211 (9th Cir. 1952); *North Atlantic Route Transfer Case,* 12 CAB 124 (1950), 14 CAB 910 (1951); *Kent* v. *CAB,* 204 F.2d 263, 265 (2nd Cir. 1953), *cert. den.* 346 U. S. 826 (1953); *Outland* v. *CAB,* 284 F.2d 224, 228 (D. C. Cir. 1960). See also *United States* v. *Lowden,* 308 U. S. 225 (1939) and *Bhd. of Locomotive Eng'rs.* v. *Chicago and Northwestern Railway Company,* 314 F.2d 424

(8th Cir. 1963), *cert. den.* 375 U. S. 819 (1963). In addition, the CAB is expressly empowered, under Section 401(k)(4) of the Federal Aviation Act, 49 U. S. C. § 1371 (k)(4), to deal with allegations of Railway Labor Act violations by a carrier.*

The Court of Appeals, comparing petitioners' claims before the CAB and the District Court, found "some allegations in the complaint not made in plaintiffs' petition before the Board, but in essence they are the same, although in some instances couched in different phraseology." (Pet. App. 12a; 346 F.2d at 277). The Court found that "the thrust of the relief sought before the Board, as in the instant suit, rests on the premise that the seniority integration approved by the Board was not accomplished 'in a fair and equitable manner.' " (Pet. App. 13a; 346 F.2d at 277-278). The Court also stated:

> "It can hardly be doubted but that the heart of plaintiffs' contention before the Board, as well as in its complaint, is their request for relief from what they claim was their unfair listing relative to seniority rights. Other allegations in their complaint are merely subsidiary to and offered in support of that principal claim." (Pet. App. 14a; 346 F.2d at 278).

The Court came to the "inescapable" conclusion that petitioners' action "sought a review of the final order entered by the CAB on April 24, 1964" and that "their action constitutes a collateral attack upon such order." (Pet. App. 14a; 346 F.2d at 278). The Court held that petitioners had disregarded "the express terms of Sec. 1006 of the Federal Aviation Act which prescribes a direct and exclusive method of review" and "instituted the

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* Section 401(k)(4) provides:

"It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with [the Railway Labor Act]."

present action in derogation of the well settled principle that collateral attacks upon administrative orders are not permissible." (Pet. App. 11a; 346F.2d at 276-277). The Court of Appeals also noted that petitioners had pursued their CAB action "to the point of an adverse decision," (Pet. App. 14a; 346 F.2d at 278), but "no reason, much less excuse, is assigned for their failure to seek review of the Board's order in accordance with their statutory right." (Pet. App. 9a; 346 F.2d at 275-276).

The decision of the Court of Appeals that petitioners' complaint in the District Court "sought a review of the final order entered by the CAB" is correct. Here, petitioners, dissatisfied with the neutral's determination respecting their seniority rights, first petitioned the CAB, alleging discriminatory treatment in an attempt to obtain for themselves additional benefits (P.A. 99-106). They asserted that "United has invidiously discriminated against petitioners" and that "ALPA has willfully failed to perform its statutory duty as a collective bargaining agent of representing petitioners, a minority of its members, fairly and without prejudice." They also claimed that United and ALPA had discriminated against them "in bad faith and in a deliberate effort to subvert an order of the Civil Aeronautics Board which requires integration of seniority in a fair and equitable manner * * *." (P.A. 105).

After giving "careful consideration" to petitioners' allegations and statements filed by United and ALPA (D.A. 9a, 12a), the CAB, stating its reasons in detail, concluded that the seniority lists had been integrated in a "fair and equitable manner" and dismissed the petition as lacking in substantive merit (P.A. 106-115).

In the District Court, as before the CAB, the essence of petitioners' complaint is an attempt to overturn the provisions for integration of seniority approved by the CAB and to secure the added seniority to which they deem themselves entitled. Although petitioners have

reversed their position that the Board is the appropriate forum for resolving these issues (P.A. 159, 161, 172; D.A. 52a), they adhere to their claim, also made in the Cole arbitration proceeding and before the Board, that any seniority arrangement aside from the particular plan proposed by them is unfair (P.A. 4, 5, 9, 73-74, 84, 87, 100, 104-106, 126-127, 138, 176-177, 198). Thus, petitioners necessarily intend that the District Court should review the matters previously determined by the CAB and confer upon them the relief denied by the Board.

The holding of the Court of Appeals that petitioners may not maintain such an action in the District Court is based upon established law. Section 1006 of the Federal Aviation Act expressly provides that the Courts of Appeals "shall have exclusive jurisdiction" to review CAB orders, upon direct petition within 60 days after entry of the order.* The Courts have consistently held that Section 1006 deprives District Courts of jurisdiction over complaints which seek review of CAB orders, even where the attack is made under the guise of a so-called independent cause of action. See *Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407 (N. D. Ga. 1962); *Capital Airlines, Inc.* v. *United States*, 90 F. Supp. 926 (U. S. Ct. Claims 1950),

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* Section 1006 states:

"(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act * * * shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order.

* * *

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court * * *.

(d) Upon transmittal of the petition to the Board or Administrator, *the court shall have exclusive jurisdiction* to affirm, modify, or set aside the order complained of * * *." (Italics added)

cert. den. 340 U. S. 875 (1950); *Regina Cargo Lines, Inc.* v. *CAB,* 10 FRD 628 (E. D. N. Y. 1950); *Pacific Northern Airlines, Inc.* v. *Alaska Airlines, Inc.,* 80 F. Supp. 592 (D. Alaska 1948); *Alexander* v. *CAB,* not officially reported, 2 CCH Aviation Cases 14,481 (E. D. N. Y. 1947).

The principle that CAB orders are not subject to collateral attack in a District Court, even though the claim is framed in terms of a so-called independent cause of action, reflects a uniformly applied postulate of administrative law prohibiting such collateral suits where there is a prescribed method of judicial review. See *Whitney National Bank* v. *Bank of New Orleans and Trust Company,* 379 U. S. 411 (1965), dismissing an action under the national banking laws as a collateral attack on an order of the Federal Reserve Board; *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U. S. 320 (1958), dismissing a bond validation action as a collateral attack upon an order of the Federal Power Commission; *Interstate Natural Gas Co.* v. *Southern California Gas Co.,* 209 F.2d 380, 385 (9th Cir. 1953), dismissing an action alleging violations of the Mineral Lands Act, Natural Gas Act and Sherman Anti-Trust Act as a collateral attack on an order of the Federal Power Commission; *Nichols* v. *Long Island Lighting Co.,* 207 F. 2d 931 (2nd Cir. 1953), *modif.* 211 F.2d 392 (2nd Cir. 1954), *cert. den.* 348 U. S. 827 (1954), dismissing a tort action alleging fraud and conspiracy as a collateral attack on an SEC decision; *United Merchants & Manufacturers, Inc.* v. *South Carolina Electric & Gas Co.,* 113 F. Supp. 257 (W.D.S.C. 1953), *aff'd.* 208 F.2d 685, 687 (4th Cir. 1963), dismissing a complaint alleging fraud and deceit as a collateral attack on an order of the South Carolina Public Service Commission; *Edward Chappell Co.* v. *Chesapeake & O. Ry. Co.,* 110 F. Supp. 46 (S.D.N.Y. 1952), *aff'd. per curiam,* 202 F.2d 149 (2d Cir. 1953), dismissing an action to enjoin imposition of rates as a collateral attack on an ICC order; and *Harris* v.

Central Nebraska Public & Irrigation Dist., 29 F. Supp. 425 (D. Neb. 1938).*

In *Whitney National Bank* v. *Bank of New Orleans and Trust Company, supra,* this Court held that a District Court lacked jurisdiction over an action under the national banking laws, where the thrust of the complaint went to matters cognizable by the Federal Reserve Board and the applicable statute included a procedure for judicial review of Federal Reserve Board decisions. The Court found that the statutory procedure constituted the exclusive means for judicial review of Board decisions, stating:

> "This view is confirmed by our cases holding that where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive. See, e. g., *Callanan Road Improvement Co.* v. *United States,* 345 U. S. 507 (1953); *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41 (1938); *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426 (1907)." 379 U. S. at 420.

The decision also made it clear that a Board determination could not be collaterally attacked under the guise of an independent action against the Comptroller of the Currency, stating:

> "Moreover, we reject the notion that the Board's determination may be collaterally attacked in the

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* *Cf. Service and Transfer Co., Inc.* v. *Commonwealth of Virginia,* 359 U. S. 171, 176 (1959); *Callanan Road Improvement Co.* v. *United States,* 345 U. S. 507, 512-513 (1953); *Lambert Run Coal Co.* v. *Baltimore & O. R. Co.,* 258 U. S. 377, 381-382 (1922); *Stanley* v. *Supervisors of Albany,* 121 U. S. 535, 550 (1887); *Meyers* v. *Famous Realty, Inc.,* 271 F.2d 811, 817 (2nd Cir. 1959), *cert. den.* 362 U. S. 910 (1960); *Evarts* v. *Western Metal Finishing Co.,* 253 F.2d 637 (9th Cir. 1958), *cert. den.* 358 U. S. 815 (1958); *Elbow Lake Cooperative Grain Company* v. *Commodity Credit Corporation,* 144 F. Supp. 54, 61-62 (D. Minn. 1956), *aff'd.* 251 F.2d 633, 637 (8th Cir. 1958); *Applewhite* v. *Jones,* 207 F.2d 701 (7th Cir. 1953), *cert. den.* 347 U. S. 954 (1954); *Black River Valley Broadcasts* v. *McNinch,* 101 F.2d 235 (D. C. Cir. 1938), *cert. den.* 307 U. S. 623 (1939).

> District Court by a suit against the Comptroller. Opponents of the opening of a new bank by a bank holding company must first attack the arrangement before the Board, subject only to review by the Courts of Appeals. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320 (1958); *United States* v. *Corrick*, 298 U. S. 435 (1936). That Congress has not expressly provided that the statutory procedure is to be exclusive does not require a different conclusion." 379 U. S. at 421-422.

There is no merit to petitioners' contention that the decision below should be reviewed because it is in conflict with other decisions "on the principles to be applied where administrative agencies and the federal court have concurrent jurisdiction." (Petition, p. 15). In the instant case, the Court of Appeals specifically based its decision on the grounds that the complaint improperly sought a review of a CAB order in the District Court, and did not reach the issue whether the District Court and CAB would have had concurrent jurisdiction of the subject matter if the action were not a collateral attack, or if petitioners had moved in the District Court instead of the CAB. The Court, after concluding that petitioner's complaint constituted such an attack, stated:

> "*For this reason* the District Court properly dismissed the complaint. *Such being our conclusion, we do not reach the issue* as to whether the CAB had exclusive jurisdiction, as argued by defendants, or concurrent jurisdiction, as argued by plaintiffs." Pet. App. 14a; 346 F. 2d at 278. (Italics added)

Thus, petitioners' argument that this decision is in conflict with decisions in situations "*where* administrative agencies and the federal court have concurrent jurisdiction" is totally inapplicable.

Petitioners also erroneously rely upon the decision of this Court in *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963) (Petition, pp. 16-17). There, the

Supreme Court, dealing for the first time with the problem of "the application of the antitrust laws to the commercial banking industry" (374 U. S. at 324), rejected an argument that the Bank Merger Act of 1960, 12 U. S. C. § 1828(c), by requiring the Comptroller of the Currency to consider the effect on competition of proposed bank mergers, immunized mergers approved by the Comptroller from the federal anti-trust laws. This decision was based upon the peculiar facts of that case, none of which are present in the instant situation. They included the absence of any express immunity from the antitrust laws in the Bank Merger Act, the limited nature of the administrative powers vested in the Comptroller, the lack of a "specific provision for judicial review" of the Comptroller's decisions, the clear legislative history of the Bank Merger Act refuting "any suggestion that applicability of the anti-trust laws was to be affected," and the Court's determination that "bank regulation is in most respects less complete than public utility regulation, to which interstate rail and air carriers, among others, are subject." 374 U. S. at 350-352.

The Court also made clear the inapplicability of the decision to the present case by expressly distinguishing the Bank Merger Act from the Federal Aviation Act, which provides in Section 414, 49 U. S. C. § 1384, that persons affected by a CAB order under Section 408 are relieved from other authority or law to the extent necessary to implement the CAB order.* 374 U. S. at 350, n. 27.

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* Section 414 provides:

"Any person affected by any order made under sections 1378 [Section 408], 1379 or 1382 of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws' * * * and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

In addition, the Court distinguished its prior decision in *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963), which involved, as does the instant situation, "facts composing the precise ingredients of a case subject to the [Civil Aeronautics] Board's broad regulatory and remedial powers * * *." 374 U. S. at 351.

Petitioners have further attempted to support the District Court's jurisdiction in this action by reliance upon Section 1106 of the Federal Aviation Act, 49 U. S. C. § 1506.* (Petition, pp. 18-19). However, Section 1106 cannot be read in isolation from the remainder of the Act, including Section 414. The most reasonable construction, already approved by the Supreme Court in a case cited by petitioners (Petition, p. 19), is that Section 1106 preserves only those remedies which are neither inconsistent with nor abrogated by the regulatory scheme set forth in the Act. *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84, 89 (1962). Here, it seems clear that Congress intended to insure that implementation of CAB orders under Section 408 would not be obstructed by other laws. See, to this effect, *Pan American World Airways, Inc.* v. *United States, supra; Twentieth Century Airlines, Inc.* v. *Ryan*, — U. S. —, 74 Sup. Ct. 8, 11 (1953); *Kent* v. *CAB, supra*; *North Atlantic Route Transfer Case, supra*, 12 CAB at 129; *Bhd. of*

* Section 1106 provides:

"Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Locomotive Eng'rs. v. *Chicago and Northwestern Railway Company, supra.**

For an added reason, the Court below properly affirmed the dismissal of the complaint in this action. This Court has held that a prior administrative decision resulting from a proceeding involving the same issues between the same parties or those in privity with them is *res judicata* in a subsequent judicial action on the same claim. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 (1940). In that case, the plaintiff company applied to the Bituminous Coal Commission for exemption from the Bituminous Coal Act of 1937, on the grounds that it did not produce bituminous coal. The Commission denied the application. Under the Act, bituminous coal companies which did not join the "Code" established by the Act were to be taxed at higher rates than "Code" members. The plaintiff did not join the "Code" and the Collector of Internal Revenue demanded that the company pay its taxes at the higher rate. In an action by the company to enjoin such tax collection, this Court held that the underlying issue—whether the company produced bituminous coal—was the same as that upon which the administrative proceeding was predicated and that the principle of *res judicata* precluded the District Court from dealing with the matter.** See also, to

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* Petitioners also erroneously rely upon the *Delta C & S Seniority List* decision, 29 CAB 1347 (1959), which is clearly distinguishable from the instant case. There, the petitioners did not allege that ALPA had failed to perform its statutory duty of representing them fairly or negotiating with Delta regarding an integrated seniority list, or that Delta or ALPA acted in bad faith and intended to subvert the Board's order. 29 CAB at 1350. The *Delta C & S* decision dismissed the petition without reaching the merits of the case, because of the failure to make such allegations, all of which were made and ruled upon by the Board herein.

** The administrative decision therein had been upheld by a Court in the course of the statutory judicial review, but the Supreme Court did not base its holding on this factor.

the same effect, *American Air Transport, Inc.* v. *CAB*, 206 F.2d 423 (D. C. Cir. 1953); *United States* v. *3963 Bottles, More or Less*, 265 F.2d 332, 335 (7th Cir. 1959), *cert. den.* 360 U. S. 931 (1959); *George H. Lee Co.* v. *Federal Trade Commission*, 113 F.2d 583 (8th Cir. 1940) and *United States* v. *Willard Tablet Co.*, 141 F.2d 141 (7th Cir. 1944).

In the present situation, the CAB expressly reserved jurisdiction to act regarding seniority integration. Petitioners initially presented their arguments respecting the particular seniority arrangement favored by them in the Cole arbitration proceeding. Dissatisfied with Cole award and subsequent agreement, even though they lost no seniority rights and gained additional rights not possessed prior to the merger, petitioners initiated a proceeding before the CAB. The CAB could have set aside the seniority provisions complained of and granted other appropriate relief, had it concluded that ALPA and/or United had violated the merger order requiring senority integration in a "fair and equitable manner." (P.A. 35). However, the CAB, after reviewing petitioners' claims, rejected them as lacking merit. Thereafter, petitioners, ignoring the prescribed statutory review procedure, commenced the present action, once again asserting the arguments rejected by the Cole award and CAB and seeking a review of the CAB order in the District Court. It is submitted that the District Court and the Court of Appeals properly dismissed this complaint and that there is no occasion for further review of the decision below.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari be denied.

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APPENDIX A

Statutory Provisions Involved

FEDERAL AVIATION ACT OF 1958

Section 401(k)(4), 49 U. S. C. § 1371(k)(4):

> "It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with [the Railway Labor Act]."

Section 408, 49 U. S. C. § 1378:

> "(a) It shall be unlawful unless approved by order of the Board as provided in this section—
>
> (1) For two or more air carriers * * * to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;
>
> * * *
>
> (b) Any person seeking approval of a * * * merger * * * specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the * * * merger * * * and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the * * * merger * * * will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such * * * merger * * * upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * *."

Section 414, 49 U. S. C. § 1384:

> "Any person affected by any order made under section 1378 [Section 408], 1379 or 1382 of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws' * * * and of all other restraints or prohibitions made by, or imposed under, author-

ity of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

Section 1006, 49 U. S. C. § 1486:

"(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act * * * shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order.

* * *

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator, by the clerk of the court * * *.

(d) Upon transmittal of the petition to the Board or Administrator, the court, shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. * * *"

Section 1106, 49 U. S. C. § 1506:

"Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 518

JOHN J. OLING, DAVID J. LANDRY, on behalf of themselves and all other "second officers" in the employ of United Air Lines, Inc., similarly situated, *Petitioners*

v.

AIR LINE PILOTS ASSOCIATION, and UNITED AIR LINES INC., *Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

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1. A major portion of the briefs of both Respondents is devoted to an effort at justifying the April 24, 1964 Order of the CAB on its merits. In addition to the fact that in so doing Respondents have chosen to ignore the rule that, in an appeal from the granting of a motion

to dismiss for lack of jurisdiction material factual allegations of the complaint must be taken as admitted, the merits of the CAB order are in no way germain to anything raised by this Petition. A substantive reply to what Respondents have said on that matter would, therefore, be equally irrelevant and will not be made.

2. The emphasis placed by Respondents on the substantive matters that were before the CAB is part and parcel of the process by which Respondents have sought to make it appear as though this case involved a routine application of the rule prohibiting collateral attacks on administrative determinations. What makes this case so appropriate for the granting of certiorari is that Respondents succeeded so well with this confusion in the court below that there emerged from that court a decision which does not merely misapply the collateral attack rule; it develops a new rule wholly at war with what this Court has said is the law on the relationship between administrative and judicial proceedings in circumstances such as are present here.

Critical to the argument of Respondents—and to the decision below—is the assumption that the matters raised by the complaint in the District Court arose out of, and are inseparable from, the matters that were before the CAB in the United-Capital merger proceedings. The record before this Court makes it clear that this is just not true. The chain of events which lead to the complaint in the District Court had been initiated long before the merger, and they would have produced the same Railway Labor Act violations that Petitioners are seeking to remedy in this suit whether or not there had ever been a merger.

At the heart of what Petitioners are complaining of in this lawsuit is the discriminatory treatment by ALPA, their certified bargaining representative, the attempts by ALPA to coerce Petitioners in their choice of a bargaining representative, and the delegation by United to ALPA of complete control over seniority, thereby enabling ALPA to punish Petitioners for their known opposition to ALPA. These matters arose out of a struggle between ALPA and FEIA for the right to represent the flight engineers in the employ of United. That struggle began long before the merger of United and Capital was even contemplated, and it involved much more than the matter of seniority. (P.A. 121-123) What placed ALPA in the position to penalize Petitioners by discriminating against them was not the merger of United and Capital, but rather the 1961 representation proceeding, as a result of which ALPA was able to oust FEIA as the bargaining representative for flight engineers. And that representation proceeding was wholly unrelated to the merger or to the CAB proceeding involving the merger. (P.A. 122-123)

The merger was a purely fortuitous intervening circumstance which in no way changed the basic problem of whether ALPA, which had emerged (not from the merger but from the 1961 representation proceeding) as the bargaining representative for the single unit of pilots and flight engineers, was going to accord equal treatment to the flight engineers as the Railway Labor Act requires, or was going to penalize those—including Petitioners—who for years had been openly in opposition to ALPA, its policies, and its efforts to take over the bargaining rights from FEIA.

The central theme in the instant lawsuit, based upon the Railway Labor Act, is expressed in paragraph 23 of the Complaint, which states that:

> "23. The unlawful acts were motivated by defendants' desire to discriminate against plaintiffs because of their known defense of the program and policies of Flight Engineers' International Association, their known opposition to the program and policies of ALPA, and their refusal to become members of ALPA" (P.A. 8)

That allegation, as are others in a similar vein, rests upon facts that are wholly independent of the merger of United and Capital.

In the merger proceedings before the CAB so far as is relevant here, only the question of seniority was involved, and, even as to this, the CAB was concerned only with the question whether the merged seniority was "fair and equitable". This was *not* a proceeding under Section 401 (k)(4) of the Federal Aviation Act (see footnote 4 at p. 13 of the Petition); and the CAB had no jurisdiction to determine whether in negotiating the seniority issue ALPA and United had acted in accord with the Railway Labor Act,[1] or to issue any appropriate relief if it were to find that the Railway

[1] The fact that before the CAB Petitioners urged that among the reasons why the seniority merger was not "fair and equitable" was the fact that ALPA and United had acted from discriminatory motives, and had otherwise conducted their negotiations in violation of the Railway Labor Act could not serve to invest the CAB with jurisdiction to enforce the Railway Labor Act, any more than the rejection of these contentions by the CAB can be construed as a determination by the CAB of rights under the Railway Labor Act. Suppose Petitioners had claimed that the seniority merger was not "fair and equitable" because it reflected racial discrimination. Could it be argued that the CAB was thereby invested with jurisdiction to enforce the Civil Rights Acts?

Labor Act had been violated.[2] Only the CAB, acting in a Section 401(k)(4) proceeding, not here involved, or the Federal Court in suit such as the instant one has any such jurisdiction.

In the light of the foregoing, the effort to twist this case into the conventional mold of "collateral attack" must surely fail. In the precedents cited at p. 11 of

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[2] United argues (at pp. 18-19 of its Brief) that the CAB did have authority in the merger proceeding to issue an order against ALPA by referring to *Kent* v. *CAB*, 204 F. 2d 263, 266 (CA2), where the Court sanctioned the right of the Board to issue an order forbidding the *carrier* from entering into a discriminatory agreement with a union. Apart from anything else, this argument totally ignores the fact that the instant complaint seeks relief against ALPA far broader than the banning of discriminatory agreements.

Even more surprising is the reliance by United (at p. 19 of its Brief) on *Chorbajian* v. *CAB*, 229 F. 2d 81 (CA2), for the proposition that the CAB had jurisdiction in the merger proceedings to award the damages Petitioners seek if it had found merit to their complaint. In that case the Court did no more than approve the *refusal* of the CAB to interpret its order concerning seniority as having provided for any monetary compensation to the employees involved.

Nor is there any merit to the contention stated at p. 19 of United's Brief that "a suit for damages may only be entertained by the courts after the Board has already found that a violation of the statute has been committed." In a situation directly comparable to what is presented here (i.e. suits under Section 303 of The Labor-Management Relations Act, as described at p. 21 of the Petition) this Court has made it perfectly clear that where Congress has made certain conduct subject to both "administrative and conventional legal sanctions", the remedies are independent of each other; the Court does *not* require a "substantive symmetry" between the administrative and judicial approaches; and damages may not be denied on the ground that the administrative agency has not found the conduct unlawful. *International Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, 243-244; *NLRB* v. *Radio Engineers et al.*, 364 U.S. 573, 585.

United's Brief, and at p. 11 of ALPA's Brief, the suits found to be barred by the rule against collateral attack involved a matter which arose directly out of the issues that were before the administrative agency, and had no real independent existence. What is more, in all of the cases relied upon the lawsuit was a direct attack upon an affirmative order issued, or similar action taken by the administrative agency; and if the court were to grant the relief sought in the lawsuit the heart and substance of the action taken by the administrative agency would have been negated. That is a far cry from the instant case. The CAB has issued no order of any kind directed at the Railway Labor Act violations here involved; and nothing sought by Petitioners would affect in any way approval of the merger between United and Capital which was the heart and substance of that proceeding.

An examination of the District Court decision in *Holman* v. *Southern Airways Inc.*, 210 F. Supp. 407 (N.D. Ga.), on which Respondents as well as the court below place very heavy reliance, points up the essential distinction. In that case, the CAB, *acting not in a merger proceeding but rather under the aforementioned Section 401(k)(4) of the Federal Aviation Act,* found that Southern had violated the Railway Labor Act by discriminating against certain striking pilots. The CAB had issued an order specifically directing Southern to reinstate the strikers, and to grant them seniority ahead of the pilots who had been hired during the strike to replace them. The lawsuit in *Holman* was instituted by those replacements asking that Southern and ALPA be enjoined from putting into effect the remedial order issued by the CAB on the specific ground, as the Court put it, that ". . . the orders of

the Civil Aeronautics Board were made without their being given their day in court . . .", and on the ground that ". . . the orders of the Civil Aeronautics Board, which they are challenging herein, and the agreements made pursuant thereto are contrary to contractual employment undertakings by defendant Southern Airways Inc., with the respective individual plaintiffs."

Whether or not the Court reached the proper conclusion in *Holman,* it is at least understandable that the Court should there conclude that the suit was one involving an attempt to obtain review of the CAB order with respect to Railway Labor Act violations. In the instant case, however, no proceeding was instituted under that section of the Federal Aviation Act giving the CAB jurisdiction with respect to Railway Labor Act violations, and no order has been issued by the CAB which would be negated by the relief Petitioners seek herein.

3. The heavy reliance by Respondents, as well as the court below, on *Whitney National Bank* v. *Bank of New Orleans & Trust Co. et al.,* 379 U.S. 411, is particularly significant and revealing. As noted in the Petition (pp. 19-20) critical to the decision of this Court in *Whitney* was the finding that the jurisdiction of the Federal Reserve Board over the matter which was the subject of that lawsuit against the Comptroller of the Currency is *"original and exclusive."* The decision does not say that before one may attack the Comptroller of the Currency on the issue of the holding company operation one must *first* appeal from the decision of the Federal Reserve Board on that issue. It says that where, as in that case, the object of the attack is the issue of the holding company operation, the *only* agency with any jurisdiction

in the matter is the Federal Reserve Board, and the *only* remedy against a decision by the Federal Reserve Board on that issue is an appeal from that decision, and not a suit against the Comptroller.

Thus, the decision below extends *Whitney* far beyond what was plainly intended by This Court, *unless* it be also accepted as a valid proposition that the jurisdiction of the CAB in the matters covered by the instant complaint was, as in *Whitney,* "original and exclusive".

And, while repeatedly protesting that the court below did not rule that the CAB had exclusive jurisdiction in the matter, Respondents cannot resist suggesting (e.g. United Brief p. 21) that the decision below should be sustained on the theory that under the Federal Aviation Act approval by the CAB of the seniority arrangements negotiated between United and ALPA immunized those arrangements from any claim of Railway Labor Act violation, which is really just another way of stating the claim of exclusive CAB jurisdiction.

But neither the claim of exclusive CAB jurisdiction of the matters covered by the instant complaint, nor the related immunity argument, can be sustained—indeed, as pointed out in the Petition (Footnote 4 pp. 12-14), such contentions have been disavowed by the CAB itself.

It should also be noted that to the extent that the decision below must be rationalized by the suggestion that the CAB order in the merger proceeding immunized the transaction against any claim of Railway Labor Act violation, it is squarely in conflict with the decision in *Trans World Airlines* v. *Hughes,* 332 F. 2d

602 (CA2), (cert. granted 33 U.S. Law Week 3182; but later dismissed as having been improvidently granted 33 U.S. Law Week 3295), thereby adding an additional justification for the granting of the instant Petition. The Second Circuit, in *Trans World* had before it a case in which the CAB, acting under Section 408 of the Federal Aviation Act had approved certain financing arrangements proposed by the controlling stockholders of TWA, which, among other things, had the effect of limiting TWA in the sources from which it could lease or purchase equipment. TWA thereafter brought suit in a federal district court claiming that those arrangements violated the Sherman and Clayton antitrust acts. The suit was defended on the ground that approval by the CAB had immunized the transactions against suits based on the antitrust laws. The district court rejected that defense, and the Second Circuit agreed, in the following language that is directly applicable here, and is diametrically opposed to the result reached by the court below in the instant case:

> *"Nowhere in the Act is the Board specifically charged with the duty of monitoring each transaction which is ultimately effected between the carrier and its controller once an acquisition is approved. The Board concededly may condition its approval of a control acquisition upon such terms as it may find to be just and reasonable and thereby retain a continuing jurisdiction over the activities of the controlling party.* In the exercise of this supplementary power the Board *may investigate and regulate certain aspects of transactions effected between an air carrier and the controlling party. But the existence of this power—which was employed in approving Toolco's acquisition of control over TWA—hardly supports the defendants' claim that Congress placed the regu-*

> ***lation of everything which might flow from such transactions within the exclusive jurisdiction of the CAB.*** The issue here is not whether the CAB may consider such matters but rather whether the federal courts have been excluded from their consideration by Congress. There is virtually no limit to the nature and variety of the transactions which fall within this category. ***In the absence of an explicit congressional mandate entrusting such transactions exclusively to the Board we can find no basis for declaring the federal courts to be without jurisdiction in such matters."*** (332 F. 2d 602, at 608-609, Emphasis added)[3]

4. In truth, as set forth in the Petition, the decision below cannot be read except as enunciating a new rule—contrary to everything thus far established by this Court—that even where there is concurrent administrative and judicial jurisdiction,[4] the prosecution of the administrative remedy to the point of an adverse decision, precludes resort to the judicial remedy.

Striving to avoid that inescapable conclusion, United injects a new, and even more surprising propo-

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[3] United, at p. 21 of its Brief, cites *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry. Co.*, 314 F. 2d 424 (CA8) for the proposition that the ICC has jurisdiction to prescribe seniority arrangements even though such arrangements may conflict with procedures prescribed by the Railway Labor Act. The suit in that case was not based on the Railway Labor Act but was to enforce the arrangements which had been specified by the ICC and *agreed to* by the very parties to the litigation. Significantly, the Court specifically *rejected* the contention that the action of the ICC had ousted the Federal Courts of jurisdiction (314 F. 2d at 428).

[4] In the context of the instant case, the statement by the court below that "we do not reach" the issue of whether the CAB had exclusive or concurrent jurisdiction plainly means only that it makes no difference how that issue may be determined, i.e. that the election of remedies is binding whether it be true that the CAB's jurisdiction is exclusive or concurrent.

sition (United Brief pp. 19-20). We are told, in substance, that what the decision below really stands for is the rule that where, as here, a complainant with rights justiciable both before an administrative and a judicial forum proceeds first before the administrative agency in order to avoid the claim of failure to exhaust administrative remedies, he must appeal from an adverse administrative determination before he may resort to the judicial remedy.

But such is surely not the law, and none of the cases cited by United stands for any such proposition. Two illustrations from the cases cited at p. 20 of United's Brief should suffice to make this clear. In *Pennsylvania Railroad Co.* v. *United States,* 363 U.S. 202, this Court held only that the complainant was *entitled* to obtain a review of an adverse decision from the ICC, and that the Court of Claims should have acceded to the request of that complainant to stay the proceedings in a related proceeding until the review in a District Court had been obtained. There is not the remotest suggestion that if the complainant had elected not to avail itself of the review the Court of Claims would be without jurisdiction to proceed.

In *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752, the complainant filed suit in the court *while the proceeding before the administrative agency was still pending and not yet determined.* This Court held no more than that the doctrine of exhaustion of administrative remedies requires "awaiting their final outcome before seeking judicial intervention".

In the instant case, Petitioners awaited the final outcome of the administrative proceedings before instituting judicial proceedings. The CAB having no authority effectively to remedy the Railway Labor Act

violations involved, it was only an abundance of caution that dictated proceeding initially before the CAB in the merger proceeding. Had Petitioners appealed and prevailed, they could not have obtained the measure of relief that is available to them in a proceeding before a Federal Court under the Railway Labor Act, and this suit would have to have been ultimately filed in any event. But they are now told that having elected to proceed first before the CAB in an effort to obtain whatever limited measure of relief might there be available, having been denied that relief, and not having appealed that denial they have lost their judicial remedy—and this even if it be assumed that the courts share concurrent jurisdiction with the CAB on the matters covered by the complaint.

If that is the way in which the Federal Aviation Act, (and, since the issues are the same, the Interstate Commerce Act) is to be read, this Court should say so. Unless the matter is clarified by this Court, the decision below, when read in the light of all other applicable precedents, leaves the thousands of employees who are affected by airline and railroad mergers and consolidations in hopeless confusion.

Respectfully submitted,

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